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No. 99-391

IN THE
SUPREME COURT OF THE UNITED STATES

ROBIN FREE and RENEE FREE,

Petitioners,

v.

ABBOTT LABORATORIES, BRISTOL-MYERS SQUIBB COMPANY and MEAD JOHNSON & COMPANY

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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October 15, 1999

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Where original federal jurisdiction exists, pursuant to 28 U.S.C. § 1332, over the representative plaintiffs in a class action, may the federal courts exercise supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over other putative class members whose claims form part of the same case or controversy as the claims of the representative plaintiffs but would otherwise not fall within 28 U.S.C. § 1332?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

This is to certify that Respondents Abbott Laboratories and Bristol-Myers Squibb Company have no corporate parents and that no publicly traded company owns 10% or more of their stock. Respondent Mead Johnson & Company is a wholly owned subsidiary of Bristol-Myers Squibb Company.

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Respondents Abbott Laboratories, Bristol-Myers Squibb Company and Mead Johnson & Company submit this brief in opposition to the Petition for a Writ of Certiorari in the above-captioned case.

INTRODUCTION

Petitioners Robin Free and Renee Free portray the Fifth Circuit's decision in *In re Abbott Labs.*, 51 F.3d 524 (5th Cir. 1995) ("*Abbott*"), as a major assault on federalism and a dramatic expansion of federal jurisdiction. In fact, it is nothing of the kind. The *Abbott* decision is solidly grounded in the plain and unambiguous language of 28 U.S.C. § 1367. Not only was it correctly decided, but it also will have only the most marginal of impacts on the federal courts. Petitioners can identify—and Respondents have found—just a single case, *Abbott* itself, that has applied the Fifth Circuit's analysis to find federal jurisdiction over a class action where such jurisdiction otherwise would not have existed. *Abbott* clearly does not raise the kind of issue of transcendent national importance that

would justify granting the current petition for a writ of certiorari. That point is underscored by the fact that Petitioners did not discover their purported concern for federalism until four years after the decision they now bring before this Court. Both in the Fifth Circuit and here, Petitioners have practiced a strategy of selectively appealing some issues while saving others for later appeal. That strategy constitutes a far greater threat to federal judicial resources than anything in the Fifth Circuit's *Abbott* decision.

Abbott's limited nature is not surprising. Indeed, it is inherent in the nature of class actions, since most certified classes are relatively homogenous both in terms of class members' underlying claims and their alleged harm. If the representative plaintiffs have suffered small alleged damages, so generally have other class members; if the representative plaintiffs' alleged damages are large, so too are those of the rest of the class. It is only in the highly unusual circumstance—often, as in *Abbott* itself, having nothing to do with the damages alleged—that the class becomes "lumpy", with some members having larger claims and others having smaller ones.

Abbott, for example, was but one of 21 indirect purchaser antitrust class actions that the same group of lawyers who represent Petitioners brought in 18 different states alleging the same price fixing conspiracy by the same three Respondent manufacturers of infant formula. Of those 21 class actions, Respondents sought to remove nine to federal court. All of the removed cases, with the sole exception of *Abbott*, were remanded to the states where they originated. All 20 class actions besides *Abbott* were prosecuted in state court. There could not be a better demonstration of the singularity of the *Abbott* result.

In *Abbott*, the class became "lumpy" because of an unusual Louisiana statute that expressly awards all attorney's fees in a class action to the representative plaintiffs. La. Code Civ. Pro.

Art. 595 ("Art. 595"). The operation of Art. 595—which exists in none of the other states where Petitioners' counsel brought related indirect purchaser infant formula suits (nor in any other state that Respondents have found)—made the Louisiana representative plaintiffs' potential recovery substantially larger than that of any other class members. And that "lumpiness" derived not from differences in alleged damages, but purely from the different way that the Louisiana statute affected the representative plaintiffs.

Although Petitioners assert that the *Abbott* result "significantly shifts to federal courts state-law claims that do not satisfy the jurisdictional minimum" (Petition for a Writ of Certiorari ("Cert. Pet.") at 18) and "significantly taxes federal court resources" (*id.* at 19), the history of the litigation of which *Abbott* is a part proves just the opposite. *Abbott* is a singular result. It is, therefore, not a case that justifies this Court's review.

COUNTERSTATEMENT OF THE CASE

This petition is the last vestige of a series of lawsuits that began in early 1991 and alleged that Respondents (and others) had conspired to fix the price of infant formula sold in the United States. The first group of suits included: (a) more than 20 class actions filed in federal district courts around the country (some by the same counsel that represent Petitioners here) on behalf of direct purchasers of infant formula (primarily retailers and wholesalers); (b) an action filed in federal district court in Florida by individual retailers; and (c) an action filed in federal district court in Florida by the Florida attorney general. All those cases alleged violations of the Sherman Act. They were consolidated for pretrial purposes in the United States District Court for the Northern District of Florida under the caption *In re Infant Formula Antitrust Litig.*, MDL 878, and were settled in mid-1992. A state court suit by indirect purchasers (consumers) alleging violations of the California antitrust statute was settled in early 1993.

After those settlements, one group of lawyers who had represented some of the plaintiffs in the direct purchaser cases recruited Nestle Food Company, a competitor of Respondents, to file suit in the United States District Court for the Central District of California. That case went to trial in mid-1995 and, after five weeks, the jury returned a defense verdict, finding that the conspiracy alleged by the plaintiff—the same conspiracy that formed the basis for all the lawsuits—did not exist. In January 1997, the United States Court of Appeals for the Ninth Circuit affirmed that verdict.

Another group of lawyers from the direct purchaser cases—who are now Petitioners' counsel in this case—chose a different path but also ended up on the losing end of a jury verdict. Those lawyers sued Respondents in 18 states alleging, on behalf of purported statewide classes of indirect purchasers, that the same antitrust conspiracy alleged in the direct purchaser cases violated state antitrust and consumer protection statutes. In the fall of 1995, the first and only of those indirect purchaser lawsuits was tried to a jury in Wichita, Kansas, and, after a nine week trial, the jury returned a verdict of no conspiracy.

Of the other state indirect purchaser cases, defense motions to dismiss the complaint were granted in whole or in part in ten of them and four of seven plaintiffs' motions to certify a class were denied. By mid-1997, the parties had agreed to settle all the suits—including this one—that were still pending in trial courts or on appeal.

Petitioners' counsel filed the current lawsuit in Louisiana state court on October 14, 1993. Respondents removed the case to the United States District Court for the Middle District of Louisiana on November 26, 1993, and, on April 5, 1994, the district court remanded it to state court. In ordering remand, the district court ruled that federal jurisdiction existed over the representative plaintiffs pursuant to 28 U.S.C. § 1332 and over the absent class members pursuant to 28 U.S.C. § 1367.

Nonetheless, the court declined, pursuant to 28 U.S.C. § 1367(c), to exercise supplemental jurisdiction over the absent class members and abstained from exercising diversity jurisdiction over the representative plaintiffs.

Respondents sought review of the district court's remand order in the United States Court of Appeals for the Fifth Circuit both by direct appeal and by petition for a writ of mandamus. On April 24, 1995, the Fifth Circuit reversed, holding that federal jurisdiction existed, pursuant to 28 U.S.C. § 1332, over the representative plaintiffs and, pursuant to 28 U.S.C. § 1367, over the absent class members, that it was error for the district court to abstain from exercising diversity jurisdiction over the representative plaintiffs, and that it was an abuse of discretion to decline supplemental jurisdiction over the absent class members. On September 1, 1995, the Fifth Circuit denied rehearing and rehearing *en banc*.

At that time, if Petitioners truly believed that the Fifth Circuit's ruling was an assault on federalism and an affront to federal jurisdiction, they could have sought review in this Court by petition for writ of certiorari. It would have been particularly appropriate at that time to do so since it was important for Petitioners to know the proper court in which their Louisiana claims were to be litigated. That is because the Louisiana case was then one of more than 20 related indirect purchaser lawsuits that were currently pending and were, in all likelihood, either going to be tried *seriatim* or settled together.

Instead, Petitioners elected to return to the United States District Court for the Middle District of Louisiana and litigate their claims there. It was four years later—(1) after that court had refused final approval of the settlement of the Louisiana case, (2) after it had granted Respondents' motion to dismiss for failure to state a claim, (3) after Petitioners had appealed to the Fifth Circuit a second time, unsuccessfully re-raising jurisdictional arguments already rejected by the earlier appellate panel, (4) after the Fifth Circuit had certified state

antitrust issues to the Louisiana Supreme Court, (5) after the Louisiana Supreme Court had refused to accept that certification, (6) after the Fifth Circuit had then affirmed the district court's dismissal of the case, and (7) after all other related lawsuits had long since been either won by Respondents or settled by the parties—that Petitioners sought, as a way to resurrect the Louisiana action, review of the ruling on remand that the Fifth Circuit had made back in 1995.

REASONS FOR DENYING THE WRIT

I. THE *ABBOTT* DECISION HAS ONLY THE MOST MARGINAL IMPACT ON FEDERAL JURISDICTION AND, THEREFORE, DOES NOT CREATE AN ISSUE OF NATIONAL IMPORTANCE.

There is only one case—*Abbott* itself—in which a court has applied the *Abbott* ruling to find federal jurisdiction over a class action where such jurisdiction would not otherwise have existed. Although Petitioners assert that some federal courts have "followed" the *Abbott* result and others have "expressly rejected" it (Cert. Pet. at 8), the fact is that in none of the cases cited by Respondents has the *Abbott* decision been the reason a federal court has asserted federal jurisdiction over a class whose claims, in the absence of *Abbott*, would not have fallen within 28 U.S.C. § 1332. Indeed, Petitioners cannot point to even one of the 20 other indirect purchaser infant formula antitrust class actions that their counsel brought in state courts around the country where federal jurisdiction was held to exist on the basis of the *Abbott* ruling.

Abbott's exceedingly limited applicability is demonstrated by the very cases that Petitioners describe as "following" the *Abbott* decision. In the first of those cases, *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928 (7th Cir. 1996) (Cert. Pet. at 10), Judge Easterbrook did state that "[w]e follow *Abbott Laboratories*, which has strong support from the statutory text [of 28 U.S.C. § 1367]". *Id.* at 930. *Stromberg*,

however, unlike *Abbott*, was not a class action. It involved only two plaintiffs, one whose claims exceeded the amount in controversy requirement of 28 U.S.C. § 1332 and one whose did not. It was not a case that raised the same sorts of issues that arise in the class action context, where there can be many small claims. Nor was it a case that supports Petitioners' argument that *Abbott* will throw open the doors of the federal courts to a plethora of class actions that should be prosecuted in the state courts. Wholly apart from *Abbott*'s analysis of 28 U.S.C. § 1367, *Stromberg* involved precisely the kind of situation that pendent or supplemental jurisdiction has always been understood to cover. As Judge Easterbrook explained:

> "The two plaintiffs are affiliated corporations under common control. The claims arose out of the same construction project. According to the complaint, the defendants pursued a single course of action . . . . [F]actual and legal issues are identical. This strikes us as exactly the sort of case in which pendent-party jurisdiction is appropriate. It is two for the price of one: to decide either plaintiff's claim is to decide both, and neither private interests nor judicial economy would be promoted by resolving Stromberg's claim in federal court while trundling Comfort Control off to state court to get a second opinion."

Id. at 932.

In *Channell v. Citicorp Nat'l Serv., Inc.*, 89 F. 3d 379 (7th Cir. 1996) (Cert. Pet. at 19), Judge Easterbrook held that federal jurisdiction existed, pursuant to 28 U.S.C. § 1367, over a state law *counterclaim* that had been asserted by a *defendant* against a class whose suit "rest[ed] on the federal-question jurisdiction of 28 U.S.C. § 1331". *Id.* at 384. Thus, *Channell*, like *Stromberg*, also does not implicate the class action floodgates risk that Petitioners purport to find in *Abbott*.

Petitioners' other Seventh Circuit case, *In re Brand Name Prescr. Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997)

(Cert. Pet. at 10), also demonstrates *Abbott*'s limited impact. In that case, Chief Judge Posner mentioned in passing that the Seventh Circuit had "signified our agreement with" *Abbott*, *id.* at 607, but went on to hold that since none of the representative plaintiffs there satisfied the amount in controversy requirement of 28 U.S.C. § 1332, the *Abbott* ruling necessarily led to the conclusion that federal jurisdiction did not exist over a state law class action that had been removed to federal court. *Id.* at 607-09. Judge Posner found that neither the $500 penalty under Alabama law for each instance of injury nor the state plaintiffs' request for punitive damages nor the cost to the defendants of complying with the injunction that the plaintiffs sought would result in any class member's satisfying the amount in controversy requirement. *Id.* The *Brand Name Prescr. Drugs* case, therefore, demonstrates the limited nature of the *Abbott* ruling.

The district court decisions that Petitioners cite are no different. In *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 60 (D. Mass. 1997) (Cert. Pet. at 14 n.1), there was federal question jurisdiction under 28 U.S.C. § 1331, and the court exercised pendent jurisdiction over certain state law fraud claims. That, of course, is classic pendent claim jurisdiction under *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), and the Duhaime court, therefore, expressly identified its citation to *Abbott* as an "[a]lternative[]". *Id. See also Leszczynski v. Allianz Ins.*, 176 F.R.D. 659 (S.D. Fla. 1997) (Cert. Pet. at 14 n.1) (*Abbott* citation dictum because diversity jurisdiction existed as to one claim and the court exercised *Gibbs*-type pendent jurisdiction over two other claims involving the same parties); *Howard v. Globe Life Ins. Co.*, 973 F. Supp. 1412, 1415-16 (N.D. Fla. 1996) (Cert. Pet. at 14 n.1) (federal jurisdiction lacking over a class asserting state law fraud claims because "no single plaintiff's claim satisfies the amount in controversy requirement"); *Gilmer v. Walt Disney Co.*, 915 F. Supp. 1001, 1013-14 (W.D. Ark. 1996) (Cert. Pet. at 14 n.1) (*Abbott* citation dictum because federal diversity

jurisdiction was based on a ruling that any punitive damages award would constitute a common fund).

Thus, as the cases cited by Petitioners themselves demonstrate, *Abbott* is a decision of greatly restricted applicability. It fails to raise an issue of national importance sufficient to justify this Court's granting the writ.

II. THE *ABBOTT* RESULT WAS CAUSED BY LOUISIANA'S EXCEPTIONAL CLASS ACTION ATTORNEY'S FEES STATUTE, WHICH UNDERSCORES *ABBOTT*'S GREATLY LIMITED APPLICABILITY.

Under Art. 595, "[t]he court may allow *the representative parties* their reasonable expenses of litigation, *including attorney's fees*, when as a result of the class action a fund is made available, or a recovery or compromise is made which is beneficial to the class". (Emphasis added.) The Fifth Circuit in *Abbott* held that "[t]he plain text of the first sentence of 595 awards the fees to the 'representative parties,'" as a result of which "the individual claims of the class representatives met the requisite jurisdictional amount" under 28 U.S.C. § 1332. 51 F.3d at 526-27. The court went on to hold that, in such a situation, diversity jurisdiction exists, pursuant to 28 U.S.C. § 1332, over the representative plaintiffs' claims and supplemental jurisdiction exists, pursuant to 28 U.S.C. § 1367, over the claims of absent class members that fail to satisfy the jurisdictional amount. *Id.* at 529.

The important point for present purposes is that the only reason the Fifth Circuit reached the question of the applicability of section 1367 to absent class members was because of the effect (unchallenged here) of Art. 595 on diversity jurisdiction over the representative plaintiffs. Art. 595 created a "lumpy" class—a highly unusual situation—where the representative plaintiffs' claims far exceeded the claims of the rest of the class. Respondents have found no statute in any other state that, like Art. 595, awards attorney's fees to the representative

plaintiffs in a class action. Thus, "lumpiness" derived from that kind of statute is confined to class actions originating in Louisiana state court and, therefore, does not present an issue of transcendent national importance sufficient to justify review by this Court.

The same conclusion arises, as discussed *supra* at 6-9, from a survey of the cases cited by Petitioners that "follow" *Abbott*. In none of those cases was federal jurisdiction dependent upon the existence of a "lumpy" class. *Abbott* stands alone in that respect.

The greatly limited nature of *Abbott* is further apparent from an analysis of the 20 indirect purchaser infant formula class actions filed by Petitioners' counsel in states other than Louisiana. None of those other infant formula cases had a "lumpy" class. In none of them was there a state statute anything like Art. 595. In fact, each of the eight times that Respondents sought to remove one of the cases, it was remanded to the state court from which it came.

Thus, in *Lauderdale v. Abbott Labs.*, Civil Action No. 94-0659-B-C (S.D. Ala. April 4, 1995) (Appendix ("App.") at 1a-6a), the court ordered the action remanded because Respondents failed to show that any class member satisfied the amount in controversy requirement. In *Lambert v. Abbott Labs.*, Civil Action No. 94-0677-L(J) (W.D. Ky. May 23, 1995) (App. at 7a-15a), *DeVincenzi v. Abbott Labs.*, CV-S-94-527-LDG (RJJ) (D. Nev. Nov. 16, 1994) (App. at 16a-21a), *Blake v. Abbott Labs.*, 894 F. Supp. 327 (E.D. Tenn. 1995), *Buscher v. Abbott Labs.*, Civil Action No. 2:94-0422 (S.D. W.Va. Sept. 26, 1994) (App. at 22a-23a), and *Carlson v. Abbott Labs.*, Case No. 94-C-378 (E.D. Wis. July 21, 1994) (App. at 24a-29a), Respondents did not even assert diversity jurisdiction as a ground for removal; they relied solely on a claim of federal question jurisdiction, which was rejected by the court in each case. In *Moore v. Abbott Labs.*, 900 F. Supp. 26 (S.D. Miss. 1995), and *Heilman v. Abbott Labs.*, A1-94-122

(D.N.D. April 17, 1995) (App. at 30a-31a), the court remanded on the ground that Respondents failed to establish either diversity or federal question jurisdiction. In none of the other 12 cases did Respondents seek to remove on any ground.[1]

The lesson of these cases is, once again, *Abbott*'s highly unusual nature and its correspondingly limited applicability. No state of which Respondents are aware has a statute like Art. 595. In no indirect purchaser infant formula case except *Abbott*—and in no other case of any kind that Respondents have found—has *Abbott* been necessary to confer federal jurisdiction over a class where, in the absence of *Abbott*, federal jurisdiction would not have existed.

Petitioners' assertion that *Abbott* will have a "substantial impact on [federal court] resources" and will "greatly increase the number of state-law cases in federal courts" (Cert. Pet. at 18) is disproved by the facts. *Abbott* is a singular result. At most, it will lead to a few drops of additional federal litigation, not to the flood that Petitioners purport to foresee.

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[1] Respondents did successfully remove one other state indirect purchaser infant formula class action—a case that was filed in Massachusetts state court by counsel other than those representing Petitioners. *See Boos v. Abbott Labs.*, Civil Action No. 95-10091-NG (D. Mass. Aug. 18, 1995) (App. at 32a-43a). There, the court held that the financial impact on Respondents of the declaratory relief sought by the class was sufficient to satisfy the amount in controversy requirement of 28 U.S.C. § 1332. App. at 41a-42a. In dictum, the court also stated that removal was consistent with the ruling in *Abbott*. App. at 35a-41a. In doing so, the court expressed the view that Mass. Gen. Laws ch. 93A, § 9(4), was "not at all unlike" Art. 595. App. at 38a. That, however, is not correct. The Massachusetts statute merely awards attorney's fees in a successful antitrust case to "the petitioner"; unlike Art. 595, it does not expressly attribute attorney's fees in all class actions to the representative plaintiffs. Statutes like the one in Massachusetts are generally construed to require a pro rata allocation of attorney's fees to *all* class members for purposes of calculating the amount in controversy. *See, e.g., Goldberg v. CPC Int'l Inc.*, 678 F.2d 1365, 1367 (9th Cir.), *cert. denied*, 459 U.S. 945 (1982).

III. THE FIFTH CIRCUIT'S DECISION IN *ABBOTT* WAS CORRECT

In *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), this Court ruled that each class member in a class action "must satisfy the jurisdictional amount" and that any class member who fails to do so "must be dismissed from the case". *Id.* at 301. As a result, the Court affirmed a lower court ruling that exercised jurisdiction, pursuant to 28 U.S.C. § 1332, over only those class members whose claims exceeded the amount in controversy requirement and dismissed the other members of the class. *Id.* at 292, 301.

Seventeen years later, Congress enacted 28 U.S.C. § 1367. Pursuant to the new statute, a district court that has "original jurisdiction" over some plaintiffs may exercise "supplemental jurisdiction" over any other plaintiffs who have "claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy". It is quite straight forward to apply 28 U.S.C. § 1367 to the facts of *Zahn*. As this Court held, the district court there did have (and properly exercised) "original jurisdiction", pursuant to 28 U.S.C. § 1332, over those class members who satisfied the jurisdictional amount (even though other members of the class had to be dismissed from the case). With the district court having "original jurisdiction" over some plaintiffs, 28 U.S.C. § 1367 allows it to exercise "supplemental jurisdiction" over the remainder of the class, because their claims obviously "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy".

That is precisely what the Fifth Circuit held in *Abbott*, 51 F.3d at 529, and—based upon the plain and unambiguous language of 28 U.S.C. § 1367—it is manifestly correct. The Fifth Circuit supported its conclusion by pointing out that, although there are specifically enumerated exceptions in 28 U.S.C. § 1367(b) to a district court's ability to exercise

supplemental jurisdiction, class actions are not among them. *Id.* at 527. That is also manifestly correct.

Especially where a statute prescribes exceptions by express reference to particular Federal Rules of Civil Procedure, the fact that the list fails to include Rule 23 necessarily means that Rule 23 is not among the exceptions. The absence from the list of Rule 23 cannot be altered by the courts. In the words of this Court in *Iselin v. United States*, 270 U.S. 245, 251 (1926) (emphasis added), to add Rule 23 to the list of exceptions in 28 U.S.C. § 1367 would be "not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. *To supply omissions transcends the judicial function.*" *See also Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) (a statute's failure to include an item in a list of specific exemptions "mean[s] that under the maxim expressio unius est exclusio alterius, we must presume that" Congress did not intend the item to be exempted).

This Court has uniformly rejected interpretations that have inserted new references or requirements into statutes—as would be necessary if Rule 23 were to be read into 28 U.S.C. § 1367. That approach "would be to add a material element to the [statute], and thereby to create, not to expound, a provision of law". *Crooks v. Harrelson*, 282 U.S. 55, 58 (1930). If applying the plain language of section 1367 leads to an "objectionable" result, "in such case the remedy lies with the lawmaking authority, and not with the courts". *Id.* at 60. Where Congress has acted "in plain terms, as it has done here, it is not within the province of the court to modify the law by construction". *Id.* at 61. As this Court pointedly stated in *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (citations omitted; emphasis added):

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the

> constitutional authority of the lawmaking body which passed it, the *sole function of the courts is to enforce it according to its terms*."

Petitioners assert (incorrectly) that, in this case, that approach will lead to an expansion in federal jurisdiction and an enlargement of the federal courts' case load. Even if this were true, that "is no reason why the courts should refuse to enforce [section 1367] according to its terms". *Caminetti v. United States*, 242 U.S. at 490. "Such considerations are more appropriately addressed to the legislative branch of the government, which alone had authority to enact and may, if it sees fit, amend the law." *Id.* at 490-91. This Court has sternly cautioned that:

> "[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches."

Tennessee Valley Auth. v. Hill, 437 U.S. at 195. In short, the "task" of the courts "is to apply the [statutory] text, not to improve upon it". *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989). That is what the Fifth Circuit in *Abbott* did.

Moreover, legislative consideration of issues like those raised by Petitioners is actually going on at this time. Congress has before it legislation that would amend the diversity statute, 28 U.S.C. § 1332, in a way that would expand federal jurisdiction over class actions filed in state courts beyond anything about which Petitioners complain here. On September 23, 1999, the House of Representatives passed the Interstate Class Action Jurisdiction Act of 1999, H.R. 1875, 106th Cong., which would amend section 1332 to extend federal jurisdiction to cover class actions in which, subject to certain exceptions, there is partial diversity of citizenship between any class

member and any defendant and the aggregate amount in controversy exceeds $1 million. 145 Cong. Rec. H8563-05.[2] The House bill has been transmitted to the Senate, which has a similar bill with an amount in controversy requirement of $75,000, S. 353, pending in committee.[3] The current congressional debate on this matter is yet another reason why the Court should deny the writ and give the political branches an opportunity to act.

Petitioners argue, as they did below, that legislative history shows that the Fifth Circuit's reading of 28 U.S.C. § 1367 is inconsistent with the intent of Congress. But where, as here, the statute is clear and unambiguous on its face, it is the language of the statute—not the legislative history—that establishes congressional intent. Indeed, the very same argument was made and rejected in *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 98-99 (1991) (emphasis added), where the Court stated, in a passage particularly pertinent to this case, that:

> "The best evidence of [congressional] purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—*we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process*."

In *West Virginia Univ. Hospitals*, it was asserted—as it is here—that Congress "would have" included an item in a list prescribed in 42 U.S.C. § 1988 "had it thought about it", but "Congress simply forgot". *Id.* at 100. Even if true, this Court held—in language dispositive of Petitioners' identical argument—that supplying the missing item "profoundly mistakes our role". *Id.*

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[2] The text of H.R. 1875 can be found in App. at 44a-51a.

[3] The text of S. 353 can be found in App. at 52a-62a.

The Court's approach in *West Virginia Univ. Hospitals* is consistent with a long line of cases. As the Court explained in *Immigration and Naturalization Serv. v. Phinpathya*, 464 U.S. 183, 189 (1984) (internal quotation marks and citations omitted):

> "This Court has noted on numerous occasions that in all cases involving statutory construction, our starting point must be the language employed by Congress, . . . and we assume that the legislative purpose is expressed by the ordinary meaning of the words used."

Similarly, in *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994), the Court rejected an appeal to legislative history because "it is the statute, and not the Committee Report, which is the authoritative expression of the law". The Court made the same point in *Tennessee Valley Auth. v. Hill*, 437 U.S. at 185 n.29, where it stated that "[w]hen confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning"; in such a situation "it is not necessary to look beyond the words of the statute".[4]

This Court's decision in *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994), which was expressly relied upon by the Fifth Circuit in *Abbott*, 51 F.3d at 529, makes the

[4] *See also Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29-30 (1989) (Scalia, J., concurring in part and dissenting in part) (the Court's "task" is not "to plumb the intent of the particular Congress that enacted a particular provision"; "[i]t is our task, as I see it, not to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective—but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times"); *Caminetti v. United States*, 242 U.S. at 490 ("it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source").

point that a court is justified in ignoring the unambiguous language of a statute only if a plain reading would "produce results that were not merely odd, but positively absurd". *See also Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment) (the Court may look beyond the plain language of "a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result"); *Crooks v. Harrelson*, 282 U.S. at 59-60 (only in the "rare and exceptional circumstances" where applying "the literal terms of a statute" would "lead[] to absurd results" can the Court "justify a departure from the letter of the law"); *Caminetti v. United States*, 242 U.S. at 490 (the plain language of a statute "is the sole evidence of the ultimate legislative intent" unless it "lead[s] to absurd or wholly impractical consequences").

That is certainly not the case with regard to the statutory language of 28 U.S.C. § 1367 as read by the Fifth Circuit in *Abbott*. Justice Brennan's dissent in *Zahn* (joined by Justices Douglas and Marshall), 414 U.S. at 302-12, forcefully explicates the reasons why federal supplemental jurisdiction should be permitted over class members who do not satisfy the amount in controversy requirement whenever original federal jurisdiction exists over the representative plaintiffs.[5] A number of commentators share the same view. See *Abbott*, 51 F.3d at 529 (citing commentators). *See also Russ v. State Farm Mut. Auto. Ins. Co.*, 961 F. Supp. 808, 819 (E.D. Pa. 1997) (adopting the Fifth Circuit's literal reading of 28 U.S.C. § 1367 "would not be absurd; arguably it would be sensible").

[5] *See id.*, 414 U.S. at 308-09 (Brennan, J., dissenting) ("Not only does the practical desirability of sustaining ancillary jurisdiction bring Rule 23(b)(3) class actions within the logic of our decisions, but the Court has long since recognized that fact, and has sustained ancillary jurisdiction over the nonappearing members in a class action who do not meet the requirements of traditional rule of complete diversity").

Petitioners claim that the fact that some courts disagree with *Abbott* "lends credence to the argument that Section 1367 is ambiguous and therefore that reference to legislative history is appropriate". Cert. Pet. at 21. But that is a mere bootstrap. Those contrary decisions cannot change the plain language of the statute. Petitioners' argument actually puts the cart before the horse. It presumes ambiguity where the statutory text might be perfectly clear. It makes the whole analysis a self-fulfilling prophecy—*i.e.*, it takes the position that "because I disagree with others, there must therefore be ambiguity". That is not correct. *Before* resort can be made to legislative history, there has to be a showing that ambiguity does indeed exist in the language of the statute itself. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

As this Court stated in *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (internal quotation marks and citations omitted; emphasis added), in language that provides the clear rule of decision here:

> "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. *When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.*"

See also Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. at 123 (internal quotation marks and citations omitted) ("with a statute, when we find the terms . . . unambiguous, judicial inquiry is complete").

There is no ambiguity in the language of 28 U.S.C. § 1367. As Judge Pollak conceded in *Russ v. State Farm Mut. Auto. Ins. Co.*, 961 F. Supp. at 811, 813, section 1367 "parsed literally" and "on its face" does confer supplemental jurisdiction over absent class members so long as original federal jurisdiction

exists over the representative plaintiffs.[6] *See also Patterson Enterprises, Inc. v. Bridgestone/Firestone, Inc.*, 812 F. Supp. 1152, 1154-55 (D. Kan. 1993) ("the plain meaning of the language of [28 U.S.C. § 1367] has the effect of overruling *Zahn*"; "the legislative history is not useful in interpreting the unambiguous provisions of this statute as they relate to a case such as this one"); *Garza v. National Am. Ins. Co.*, 807 F. Supp. 1256, 1258 (M.D. La. 1992) ("this Court finds that the Congress said what it meant and that the Congress meant what it said—the language of § 1367 unavoidably overrules these pre-§ 1367 cases in those instances where the requirements of § 1367(a) are fulfilled and the exceptions of § 1367(b) are inapplicable").

Finally, extending supplemental jurisdiction to absent class members whose claims fall below the amount in controversy specified in 28 U.S.C. § 1332 raises no greater federalism concern and causes no greater expansion of federal jurisdiction than extending supplemental jurisdiction to absent class members who fail the diversity of citizenship requirement that is also specified in 28 U.S.C. § 1332. Yet that is what this Court did in *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921), even though the result implicated a limiting policy of federal diversity jurisdiction that is no less important than the amount in controversy. As Justice Brennan pointedly commented in his dissent in *Zahn*:

> "Particularly in view of the constitutional background on which the statutory diversity requirements are written, it is difficult to understand why the practical approach the

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[6] Having reached that conclusion, and having found that such a result "would not be absurd; arguably it would be sensible", *id.* at 819, Judge Pollak then improperly went on to review the legislative history, which led him to decide not to follow the plain and unambiguous language of the statute. Hence, the *Russ* decision, although disagreeing with *Abbott*, hardly supports--indeed, it directly refutes--the notion that 28 U.S.C. § 1367 is ambiguous.

> Court took in *Supreme Tribe of Ben-Hur* must be abandoned where the purely statutory 'matter in controversy' requirement is concerned."

414 U.S. at 309 (Brennan, J., dissenting; citations omitted).

With the enactment of 28 U.S.C. § 1367, the "practical approach" of *Supreme Tribe of Ben Hur* now does apply to the amount in controversy requirement as well. That result is compelled by the statute's plain language, and there is no constitutional or policy reason why it should be otherwise.

CONCLUSION

For the reasons described above, the petition for a writ of certiorari should be denied.

October 15, 1999.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

KAREN LAUDERDALE, SUING ON BEHALF OF HERSELF INDIVIDUALLY AND ON BEHALF OF PERSONS SIMILARLY SITUATED,

Plaintiffs,

v.

ABBOT LABORATORIES, ET AL.,

Defendants.

Civil Action No. 94-0659-B-C

ORDER

This matter is before the court on the plaintiff's motion to remand (tab 11). After consideration of the parties' arguments, the motion is GRANTED.

FACTS

The plaintiff, Karen Lauderdale, initially brought this action in the Circuit Court of Mobile County pursuant to Alabama Rule of Civil Procedure 23, which covers class actions. In her complaint, the plaintiff alleges that the defendants conspired to fix the price of infant formula in Alabama from January 1980 to December 1992, and seeks a declaratory judgment that the defendants engaged in the alleged conspiracy, as well as recovery for a violation of §6-5-60, Code of Alabama (1975), which allows anyone injured by an

unlawful trust to recover $500 for each instance of injury in addition to actual damages. Each member of the class seeks up to $49,000.00, exclusive of interest and costs.

DISCUSSION

Despite the defendants' suggestions to the contrary, it is well established in this circuit that the burden on a motion to remand rests with the removing party. *Gaitor v. Peninsular & Occidental S.S. Co.*, 287 F.2d 252, 253 (5th Cir. 1961). To satisfy their burden, the defendants must show that "it does not appear to a legal certainty that [the plaintiff's] claim is really for less than the jurisdictional amount." *Opelika Nursing Home, Inc. v. Richardson*, 448 F.2d 658, 663 (5th Cir. 1971). In other words, "if by a reasonable probability it appears that there is an amount in controversy exceeding the jurisdictional amount, calculated pursuant to some realistic formula, the defendants have met their burden." *Mutual First, Inc. v. O'Charley's of Gulfport, Inc.*, 721 F.Supp. 281, 282 (S.D. Ala. 1989). In addition, the defendants must overcome the narrow construction this court is required to apply to its diversity jurisdiction. *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 76-77 (1941).

The defendants contend that each prospective plaintiff meets the jurisdictional requirement, but the argument is unconvincing. Given the fact that at this point no one can say how many times each prospective plaintiff purchased infant formula supplied by the defendants, there is simply no "realistic formula" to be applied to determine if each class member meets the jurisdictional amount. For example, grandparents who took care of a grandchild a few times a year during the period at issue (and purchased formula on those occasions) would certainly qualify as class members, but would also likely fall far short of the $50,000.00 damage requirement. Since there is no

way to know at this point, and jurisdiction cannot be based upon speculation,[1] the defendants' argument on this issue fails.

The defendants' primary and best argument focuses on whether the class members' claims can be aggregated to meet the jurisdictional amount.[2] The claims may be aggregated to satisfy the amount in controversy only if the class members are "enforc[ing] a single title or right in which they have a common and undivided interest", as opposed to "separate and distinct demands". *Zahn v. International Paper Co.*, 414 U.S. 291, 294 (1973) (quoting *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911)); *see also Snyder v. Harris*, 394 U.S. 332 (1969). While this standard has been applied in a number of cases, no bright dividing line has emerged; as one district court aptly observed, "the case law on aggregation is more susceptible to clever manipulation by counsel than it is to reasoned analysis." *Nat. Organization for Women v. Mutual of Omaha Ins.*, 612 F.Supp. 100, 105 (D.D.C. 1985).

A variety of tests have been used to put the admonitions of *Zahn* and *Snyder* into effect. The Sixth Circuit has observed that "[a]n identifying characteristic of a common and undivided interest is that if one plaintiff cannot or does not collect his share, the shares of the remaining plaintiffs are increased", *Sellers v. O'Connell*, 701 F.2d 575, 579 (6th Cir. 1983), while the Seventh Circuit has held that a common and undivided interest exists "where only the class as a whole is entitled to the relief requested." *Bassett v. Toyota Motor Credit Corp.*, 818 F.Supp. 1462, 1467 (S.D. Ala. 1992) (citing *Griffith v. Sealtite Corp.*, 903 F.2d 495, 498 (7th Cir. 1990)). Along the same lines, the former Fifth Circuit held that "if plaintiffs' rights are not affected by the rights of the co-plaintiffs then there can be no aggregation." *Eagle Star Ins. Co. v. Maltes*, 313 F.2d 778,

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[1] See *Vicksburg, S & R.R. Co. v. Nattin*, 58 F.2d 979, 980 (5th Cir. 1932).

[2] The representative plaintiff implicitly concedes that, if the claims may be aggregated, the jurisdictional amount has been met.

781 (5th Cir. 1963). All of these approaches suggest the claims here should not be aggregated, since each individual plaintiff would only be entitled to a sum based on the amount they themselves were overcharged, but are individually entitled to that sum, regardless of the claims of their co-plaintiffs.

The *Nat. Organization for Women* Court, summarizing a number of related cases, came up with the following three general rules.

> First, many of the cases that permit aggregation were federal question cases in which the court may have been stretching to find a way to provide a federal forum to vindicate federal rights. (cites omitted). Second, the cases that allow aggregation often speak of the presence of some fund to which a plaintiff class is seeking access. (cites omitted). Finally, they often involve an attempt to enforce a right that belongs to a group. (cites omitted).
>
> *Nat. Organization for Women, 612 F.Supp. at 107.*

This case clearly fails the first and third rules (since there is no federal question and the right at issue belongs to each individual plaintiff rather than the class, as the Alabama statute makes clear)[3] , and at least arguably fails the second one (since no settled fund is at stake or openly sought by the plaintiffs).[4]

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[3] *See* Code of Alabama 1975 § 6-5-60 ("Any person, firm, or corporation injured or damaged by an unlawful trust, combine or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of $500 and all actual damages. . .").

[4] In the aggregation cases cited by the defendants for the proposition that a common fund is at stake here, each class of plaintiffs were seeking the establishment of such a fund. *See Berman v. Narragansett Racing Association*, 414 F.2d 311, 315 (1st Cir. 1969) ("plaintiffs make no specific claims for individual payments") ; *Hughes v. Const. Co., Inc. v. Rheem Mfg. Co.*, 487 F.Supp. 345, 350 (N.D. Miss. 1980) (plaintiff stated in complaint that "the damages to be recovered will be in the form of this common fund for all class members"). In this case, by contrast, the plaintiffs are not attempting to set up a fund, but rather are pursuing individual claims.

In addition, several courts have held that, when there is a separate contract between each individual plaintiff and the defendant, the claims arising from those contracts are separate and distinct and cannot be aggregated to meet the jurisdictional amount. *Fennell v. Ohio Casualty Ins. Co.*, 1993 U.S. Dist. LEXIS 5295, *5 (M.D. Fla. 1993) ; *Averdick v. Republic Financial Services. Inc.*, 803 F.Supp. 37 (E.D. Ky. 1921); *Indianer v. Franklin Life Ins. Co.*, 113 F.R.D. 595 (S.D. Fla. 1986). Each separate purchase of infant formula by each individual plaintiff in this case constitutes a separate contract, which forms the theoretical basis of each plaintiff's claim. *See* Uniform Commercial Code § 2-106 (defining contract for sale as "both a present sale of goods and a contract to sell goods at a future time"). This fact also suggests that each claim is independent.[5]

Finally, there is little that separates this case from *Snyder* and *Zahn*, the cases which established the principle at issue. In *Snyder*, which addressed two related district court class action cases, the first plaintiff sued a company's board of directors on the grounds that they had sold their shares in the company for far above the fair market value, and asked that the excess be distributed among the shareholders. In the companion case, the plaintiffs alleged that the defendant gas company had overcharged its customers, and sought to retrieve the overcharged amount. The Supreme Court held that both claims were separate and distinct. In *Zahn*, a group of landowners sued the defendant paper company for allegedly polluting Lake Champlain, on which the plaintiffs' property stood. once again, despite the seemingly shared interest, the Supreme Court found that the claims could not be aggregated. Nothing in the defendants' brief distinguishes those decisions from the one

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[5] Moreover, it provides an additional ground for distinguishing *Berman*, 414 F.2d at 315, in which no individual contractual rights were alleged.

before this court, or explains why a common fund was not at stake there, but somehow is at stake here.

Bearing in mind the earlier admonition about the manipulability of the cited tests, it remains significant that each one points against aggregation. Combined with the fact that the defendants bear the burden on the issue, and the strict construction the court must give to its diversity jurisdiction, the consistency of results dictates that the plaintiffs' motion should be, and therefore is, GRANTED. It is so ORDERED.

DONE this the 4th day of April, 1995.

/s/ Charles R. Butler, Jr.
CHIEF DISTRICT JUDGE

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

JAY and CICELY LAMBERT, GLENN and ROSSANA WHITE, GUS G. and STEVINE DALEURE, and MICHAEL C. and JO ELLEN WILSON,

Plaintiffs,

v.

ABBOTT LABORATORIES, INC., and BRISTOL-MYERS SQUIBB, and MEAD JOHNSON & COMPANY,
DEFENDANTS,

Defendants.

Civil Action No. 94-0677-L(J)

MEMORANDUM OPINION

Plaintiffs brought the present action on behalf of those who, from January 1980 through December 1992, have indirectly purchased infant formula within the Commonwealth of Kentucky from named defendants. In their complaint, plaintiffs alleged that defendants' conduct constituted a restraint of trade or commerce in violation of the Kentucky Consumer Protection Act, K.R.S. § 367.175, and Kentucky common law. They also alleged that defendants' actions constituted an unfair trade practice in violation of the Kentucky Consumer Protection Act, K.R.S. § 367.170. Plaintiffs originally filed this suit in Jefferson Circuit Court, Division Fifteen, in Louisville,

Kentucky. In November 1994, defendants removed the suit to this court on the grounds of federal question and diversity jurisdiction. (Dkt. 1.) Plaintiffs then moved to remand under 28 U.S.C. § 1447(c) based on lack of subject matter jurisdiction. (Dkt. 5.) For the reasons that follow, plaintiffs' motion to remand will be granted.

The Supreme Court, in *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 391-92, 107 S.Ct. 2425, 2429 (1987), provided a "jurisdictional framework governing removal of federal question cases from state into federal courts." The *Caterpillar* Court wrote:

> Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant. Absent diversity of citizenship, federal-question jurisdiction is required. The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.

Caterpillar, 482 U.S. at 392, 107 S.Ct. at 2429 (footnote omitted). Under the "well-pleaded complaint" rule, plaintiffs are the "masters" of their complaint, and the "fact that the wrong asserted could be addressed under either state or federal law does not ordinarily diminish" the plaintiffs' right to choose a state law cause of action. *Alexander v. Electronic Data Systems Corporation*, 13 F.3d 940, 943 (6th Cir. 1994).

An exception to the well pleaded complaint rule exists when plaintiffs "artificially plead" their complaint "in order to avoid federal jurisdiction of claims that are federal in nature". *Her Majesty the Queen In Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 339 (6th Cir. 1989) (citing

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 397 n.2, 101 S.Ct. 2424, 2427 n.2 (1981); 14A C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 3722 at 270 (1985)). Pursuant to the "artful pleading" doctrine, a court "may recharacterize a plaintiffs claims as federal if 'the particular conduct complained of [is] governed exclusively by federal law.'" *Redwood Theatres v. Festival Enterprises, Inc.*, 908 F.2d 477, 479 (9th Cir. 1990) (quoting *Hunter v. United Van Lines*, 746 F.2d 635, 640 (9th Cir. 1984), *cert. denied*, 474 U.S. 863, 106 S.Ct. 180 (1985)). The Supreme Court has applied the artful pleading doctrine when a state claim is completely preempted by federal law, *Caterpillar*, 482 U.S. at 393, 107 S.Ct. at 2430, or when a state claim has already been decided in a previous federal suit, *Moitie*, 452 U.S. at 397 n.2, 101 S.Ct. at 2427 n.2.

In their motion to remand, plaintiffs argue that under the "well-pleaded complaint" rule, they are entitled to plead a state law cause of action. In response, defendants contend that the allegations in the complaint are "cognizable solely under federal antitrust law." They state that under the "artful pleading" doctrine, removal is proper. Defendants rely on *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424 (1981), *In re Wiring Device Antitrust Litigation*, 498 F.Supp. 79 (E.D.N.Y. 1980), and *Mechanical Rubber & Supply Co. v. American Saw and Mfg. Co.*, 747 F.Supp. 1292 (C.D.Ill. 1990) for the proposition that removal to federal court was warranted. In Moitie, plaintiffs' antitrust claims were dismissed on their merits in a federal district court. After the claims were dismissed, plaintiffs filed a state court action based on the same facts as the one previously filed in federal court. Defendants removed the claims to federal court, where the district court again dismissed plaintiffs' claim under the doctrine of res judicata. Approving the district court's decision, the Supreme Court provided:

> We agree that at least *some* of the claims had a sufficient federal character to support removal. . . . After "an extensive review and analysis of" the origins and substance of the two complaints, [the district court] found, and the Court of Appeals expressly agreed, that respondents had attempted to avoid removal jurisdiction by "artful[ly]" casting their "essentially federal law claims" as state law claims. *We will not question here that factual finding.*

Moitie, 452 U.S. at 397 n.2, 101 S.Ct. 2427 n.2 (emphasis added).

Moitie is distinguishable from the present suit. In *City of Detroit*, the Sixth Circuit wrote: "[C]ourts applying *Moitie* have made it quite clear that it *applies only to the removal of state claims barred by a prior federal judgment*." *City of Detroit*, 874 F.2d at 342 (emphasis added). Unlike the plaintiffs in *Moitie*, plaintiffs in the present suit have not previously sued defendants in federal court. Further, the Supreme Court did not expressly hold that removal was proper; instead, the Court, in a footnote, stated that it would not "question" the "factual finding" of the district court. The narrow *Moitie* exception is inapplicable, and removal will not be granted on these grounds. *See Redwood Theatres, Inc. v. Festival Enterprises, Inc.*, 908 F.2d 477, 480 (9th Cir. 1990); *Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368, 1376 (9th Cir. 1987), *cert. denied*, 484 U.S. 850, 108 S.Ct. 150 (1987).

Defendants' reliance on *In re Wiring Device* and *Mechanical Rubber & Supply* must also fail. In both of these cases, a federal district court allowed defendants to remove state antitrust actions to federal court. The court does not believe that federal question jurisdiction should be interpreted as broadly as the *Wiring Device* or *Mechanical Rubber &*

Supply Courts understood it to be.[1] The court cannot ignore the most recent opinions cited by plaintiffs: *Free, et al v. Abbott Labs*, et al., Civil Action No. 93-971-A (M.D. La. April 5, 1994); *Carlson v. Abbott Labs*, et al., Case No. 94-C378 (E.D. Wisc. July 21, 1994); *DeVincenzi, et al v. Abbott Labs*, et al., Case No. 94-527-LDG (D.Nev. November 14, 1994); *Buscher, et al v. Abbott Labs*, et al., Civil Action No. 2:94-0422 (S.D.W.Va. Sept. 26, 1994); and *Blake v. Abbott Labs*, et al., Civ. Action No. 3:94-CV-286 (E.D.Tenn. March 2, 1995). These cases involved the same question as the present one, i.e. whether state antitrust law creates federal question jurisdiction. Each federal district court held that no federal question jurisdiction was created and remanded the suits to state court. These cases indicate that state antitrust law does not invoke federal question jurisdiction and that removal is improper.[2]

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[1] In *Corporate Travel Consultants, Inc. v. United Airlines, Inc.*, 799 F.Supp. 58 (E.D.Ill. 1992), the *Mechanical Rubber & Supply* decision was criticized as being overly broad by a federal district court in Illinois. In a footnote, the United Airlines Court wrote:

> *Mechanical Rubber & Supply Co. v. American Saw & Mfg. Co.*, 747 F.Supp. 1292 (C.D.Ill. 1990) . . . is not persuasive. Acknowledging that it relies upon no law, because it can find none and the defendant cites none, and that the federal antitrust laws do not preempt the state antitrust laws, the district court nonetheless concludes that plaintiff's complaint is federal in nature. *Id.* at 1296. The court states that "federal antitrust laws apply to acts affecting or occurring in the flow of commerce and that the Illinois antitrust laws apply to acts affecting intrastate commerce," because Illinois would not extend its antitrust laws to burden interstate commerce. *Id.* Because the Supreme Court has indicated that little of the artful pleading exception exists beyond preemption, this court does not believe that it would be wise to adopt the broad rule stated by the district court in *Mechanical Rubber*.

United Airlines, 799 F. Supp. at 60 n. 1

[2] Defendants do not distinguish the cases cited by plaintiffs; rather, citing *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424 (1981), they argue that they were all wrongly decided.

Further, plaintiffs' state antitrust claims are not preempted by federal law. Complete preemption exists when "the preemptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, 482 U.S. at 393, 107 S.Ct. at 2430. In other words, a court will find complete preemption if "federal law has entirely preempted the field in question." *City of Detroit*, 874 F.2d at 342. State claims are preempted and "therefore removable to federal court only when there is a 'clearly manifested' intent by Congress." *Id.*

Here, Congress has not intended for federal antitrust to preempt state antitrust law. In *California v. ARC America Corporation*, 490 U.S. 93, 102, 109 S. Ct. 1661, 1665 (1989), the Supreme Court explained that "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies." Further in *City of Detroit*, the Sixth Circuit stated that only three instances exist in which the Supreme Court has found complete preemption: (1) in relation to section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185; (2) concerning the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461; and (3) concerning Indian rights. *City of Detroit*, 874 F.2d at 342 (citations omitted). Defendants cannot remove the case based on preemption.

Defendants also maintain that removal is proper because Kentucky antitrust law applies only to conspiracies that are predominantly *intra*state, as opposed to *inter*state. They argue that the facts alleged in plaintiffs' complaint encompasses a conspiracy that transpired throughout the entire United States, and must be exclusively considered under federal law. K.R.S. § 367.175(l) provides:

> Every contract, combination in the form of trust and otherwise, or conspiracy, in restraint of trade or commerce in this Commonwealth shall be unlawful.

Ky. Rev. Stat. Ann. § 367.175(l) (Baldwin 1993). Kentucky courts have not stated whether the Kentucky General Assembly intended to restrict K.R.S. § 367.175 to predominantly intrastate commerce. The court will leave the interpretation of K.R.S. § 367.175 to a Kentucky court. *See In re Sugar Antitrust Litigation.*, 588 F.2d 1270, 1273 (9th Cir. 1978), *cert. denied*, 441 U.S. 932, 99 S.Ct. 2052 (1979).

Initially, defendants stated that removal was proper based on diversity jurisdiction. However, it appears that defendants conceded that removal cannot be established on these grounds. For federal diversity jurisdiction to apply in a class action, each class member must meet the required jurisdictional amount. *Snyder v. Harris*, 394 U.S. 332, 89 S.Ct. 1063 (1969). In their complaint, plaintiffs alleged, in good faith, that the individual damages for each plaintiff will not amount to $50,000. Defendants failed to show that the amount for each plaintiff is more than that amount. Removal is improper based on diversity jurisdiction.

Plaintiffs' motion to remand the present suit to the Jefferson Circuit Court in Louisville, Kentucky will be granted. An appropriate order accompanies this memorandum opinion.

Dated: 5/23/95

/s/ Edward H. Johnstone

Edward H. Johnstone, Senior Judge

United States District Court

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

JAY and CICELY LAMBERT, GLENN and ROSSANA WHITE, GUS G. and STEVINE DALEURE, and MICHAEL C. and JO ELLEN WILSON,

Plaintiffs,

v.

ABBOTT LABORATORIES, INC., and BRISTOL-MYERS SQUIBB, and MEAD JOHNSON & COMPANY,
DEFENDANTS,

Defendants.

Civil Action No. 94-0677-L(J)

ORDER

For the reasons stated in a memorandum opinion this day entered, IT IS ORDERED:

(1) Plaintiffs' motion to remand the present action is GRANTED. (Dkt. 5.)

(2) The entire matter shall be TRANSFERRED to the Jefferson Circuit Court in Louisville, Kentucky.

(3) The clerk of this court is directed to transmit the entire record in the case to the clerk of the Jefferson Circuit Court in Louisville, Kentucky for all further proceedings.

(4) Plaintiffs' motion for attorneys fees and costs incurred in opposing removal is DENIED. (Dkt. 9.)

Dated: 5/23/95

/s/ Edward H. Johnstone

Edward H. Johnstone, Senior Judge

United States District Court

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

LAUREL A. DEVINCENZI, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED WITHIN THE STATE OF NEVADA,

Plaintiff,

v.

ABBOT LABORATORIES, BRISTOL-MYERS SQUIBB CO., AND MEAD JOHNSON & CO.,

Defendants.

CV-S-94-527-LDG (RJJ)

MEMORANDUM DECISION

On April, 27, 1994, plaintiff filed a class action in the District Court of Washoe County, Nevada, charging defendants with conspiracy to "raise, fix, maintain and stabilize at artificially high levels the wholesale prices of infant formula sold in the United States, including the State of Nevada "in violation of the Nevada Unfair Trade Practices Act ("UTPA"), Nev. Rev. Stat. §598 para. 010 et seq. (Complaint Para. 29).

On June 14, 1994, defendants alleging federal question jurisdiction removed the case to the United States District Court pursuant to Title 28, U.S.C. §§1441 and 1446. After removal, defendants moved to dismiss the Complaint for lack of standing under *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728-29 (1977). Plaintiff countermoved to remand to state court.

Defendants contend that the Nevada UTPA does not apply to price-fixing conspiracies that are predominantly interstate in nature, rather the Complaint states a federal cause of action under the Sherman Act, Title 15, U.S.C., §§ 1, et seq. Defendants argue that plaintiffs' "artfully pled" Complaint should not defeat federal jurisdiction.

Plaintiff responds that the "artful pleading" doctrine is inapplicable to this case. Since it is an exception to the well pleaded complaint rule, it is applied in only two circumstances: (1) when the complete federal preemption doctrine ousts state courts of jurisdiction to consider the claim and (2) the res judicata exception which prohibits litigation of the same claim, between the same parties in state court after it has been litigated in a federal court. Plaintiff contends that neither of the exceptions apply to the instant case and their choice of a forum must be respected. Plaintiff further argues that this Court should not consider defendants' claim that the Nevada legislature did not intend for the Nevada UTPA to apply to indirect purchasers for the reason that the nonexistence of a state cause of action is insufficient to bottom federal question removal.

Plaintiffs Motion to Remand is GRANTED. Defendants' Motion to Dismiss is DENIED.

DISCUSSION

The Artful Pleading Doctrine

The artful pleading doctrine was developed as an exception to the well pleaded complaint rule. Simply stated, this rule provides that a "party who brings a suit is master to decide what law he will rely upon." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). In the circumstance of parallel claims (state and federal) , the party may select the jurisdiction under which he wishes to proceed.

The Ninth Circuit explained in *Redwood Theatres v. Festival Enterprises*, 908 F.2d 477 (9th Cir. 1990) , limitations

on the well pleaded complaint rule. Generally a party seeking removal must identify the federal question appearing on the face of the complaint. If the federal question is not so apparent, the party seeking removal may rely on the "artful pleading doctrine" which is a narrow exception to the straightforward rules of removal jurisdiction." *Sullivan v. First Affiliated Securities*, 813 F.2d 1368, 1372 (9th Cir.), *cert. denied*, 484 U.S. 850 (1983).

The only two recognized applications of the "artful pleading rule" are when "the particular conduct complained of [is] governed exclusively by federal law." *Hunter v. United Van Lines*, 746 F.2d 635 at 640 (9th Cir. 1984), *cert. denied*, 474 U.S. 863 (1985) and when a state claim is found to be an artfully pleaded federal claim which was previously before federal court and dismissed (*res judicata* defense) *Salveson v. Western Bankcard Ass'n*, 731 F.2d 1423, 1432 (9th Cir. 1984).

The "artful pleading doctrine" is narrowly construed out of considerations of federalism, *Sullivan*, 813 F.2d at 1376, and the party invoking the removal statute bears the burden of establishing federal jurisdiction.

In the instant case neither of the exceptions to the well pleaded complaint rule applies. These plaintiffs framed their complaint under the Nevada UTPA and have never filed a parallel complaint in federal court. As to the second exception, the Supreme Court has expressly ruled that state antitrust indirect purchaser statutes are not preempted by federal law. *California v. ARC America Corp.*, 490 U.S. 93, 102 (1989). Defendants' argument that the actions complained of involve predominately interstate transactions that affect interstate commerce with only incidental affect in Nevada or any other state was rejected by the *Redwood* court citing *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 128 (1978). Nor does this Court find persuasive defendants' contention that since indirect purchasers do not have standing to sue under the Sherman Act, the Nevada UTPA would be given a similar construction by the

Nevada State court. The federalism concerns expressed by this Circuit in *Sullivan*, *supra*, lead this Court to conclude that it is the province of the Nevada state courts to construe the intent of the Nevada Legislature in enacting the Nevada UTPA. This conclusion is particularly appropriate since removal jurisdiction does not turn upon whether a plaintiff has a valid state law claim but rather whether plaintiff has artfully pled a federal law claim. *In re Sugar Antitrust Litig*, 588 F.2d 1270 (9th Cir. 1978).

CONCLUSION

Defendants' motion praying that this Court retain jurisdiction and dismiss the complaint is DENIED. Plaintiff's motion that this action be remanded to the District Court of Washoe County is GRANTED.

IT IS SO ORDERED.

/s/ Mary Johnson Lowe
MARY JOHNSON LOWE
Senior U.S District Judge

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

LAUREL A. DEVINCENZI, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED WITHIN THE STATE OF NEVADA,

Plaintiff.

v.

ABBOTT LABORATORIES, BRISTOL-MYERS SQUIBB CO., AND MEAD JOHNSON & CO.,

Defendants.

CV-S-94-527-LDG (RJJ)

ORDER

After having considered the pleadings and submissions of counsel, this Court finds that plaintiff's complaint presents no federal question within the meaning of Title 28, U.S.C. §1441(b). Accordingly, it is ORDERED, that pursuant to Title 28, U.S.C. §1441(c), this civil action be, and the same hereby is, REMANDED to the District Court of Washoe County, Nevada.

The Office of the Clerk is hereby directed to send copies of this Order and the Opinion on which it is based to counsel of record herein.

Dated this 14 day of November, 1994.

/s/ Mary Johnson Lowe
MARY JOHNSON LOWE
Senior U.S District Judge

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

DEBORAH JANE BUSCHER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED WITHIN THE STATE OF WEST VIRGINIA,

Plaintiff,

v.

ABBOTT LABORATORIES, BRISTOL-MYERS SQUIBB CO., AND MEAD JOHNSON & CO.,

Defendants.

Civil Action No. 2:94-0422

ORDER

On August 25, 1994, came the plaintiff, by her counsel, and the defendants, by their counsel, for a hearing on plaintiff's motion to remand. Having considered the pleadings filed by the parties and the arguments of counsel, this Court finds that the plaintiff's complaint presents no federal question within the meaning of 28 U.S.C. §1441(b). Accordingly, it is ORDERED, pursuant to 28 U.S.C. §1447(c), that this civil action be, and the same hereby is, remanded to the Circuit Court of Kanawha County, West Virginia.

The Clerk is directed to send copies of this order to counsel of record herein.

DATED: September 26, 1994

/s/ Dennis R. Knapp
DENNIS R. KNAPP, JUDGE

IN THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RICHARD R. CARLSON,

Plaintiff.

v.

ABBOTT LABORATORIES, BRISTOL-MYERS SQUIBB CO., AND MEAD JOHNSON & COMPANY,

Defendants.

Case No. 94-C-378

DECISION AND ORDER

This matter comes before Court on plaintiff Richard R. Carlson's ("Carlson") motion to remand the above action to Milwaukee County Circuit Court. On March 2, 1994, Carlson filed a class action suit in state court alleging that the defendants Abbott Laboratories, Bristol-Myers Squibb Company and Mead Johnson & Company (collectively, "defendants") have violated state antitrust laws in connection with the marketing and selling of infant baby formula.[1] On April 7, 1994, the defendants filed their notice of removal pursuant to 28 U.S.C., §§ 1446 and 1331 invoking this Court's

[1] There are currently pending twenty-six individual and class-actions concerning violations of the Sherman Act, 15 U.S.C. §§ 1 *et seq.* These actions have all been consolidated in the United States District Court for the Northern District of Florida. *In re Infant Formula Antitrust Litigation*, MDL Docket No. 878.

jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1441. For the reasons set forth below, Carlson's motion to remand is granted.

ANALYSIS

The issue here is whether Carlson's state law claims are actually "artfully plead" federal antitrust claims allowing this Court to retain jurisdiction. Defendants claim that Carlson is seeking to "deprive defendants of their right to have federal claims heard in federal court." (Memorandum at 1). Carlson counters that as "master of the claim", he can avoid federal jurisdiction by exclusive reliance on state law. (Memorandum at 3-4, citing, *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Thus, in accord with the so called "well-pleaded complaint" rule as defined by the Seventh Circuit: "plaintiff picks a theory (state or federal); the theory prescribes the appropriate court, which decides the case (including the defenses)." *Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1075 (7th Cir. 1992). The parties agree that there are exceptions to this general rule: (1) where "the preemptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, *supra* at 393; and (2) where the plaintiff attempts to avoid the *res judicata* effect of an adverse judgment on a federal claim by repleading the claim under state law. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981). Despite defendants' authority and argument, neither situation is present here.

The core of the defendants' argument with respect to the artful pleading exception is that because Carlson's state law antitrust claims concern *inter*state commercial activity and not solely *intra*state activity, they are clearly federal in nature. Defendants argue that Wisconsin Supreme Court precedent demonstrates that Wisconsin's antitrust laws do not reach *inter*state activity and therefore, Carlson is improperly trying to have federal claims heard in state court. Carlson's purpose in using artful pleading is to escape the Supreme Court precedent

of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) and *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).[2] Numerous "artful pleading" cases are cited in support of this proposition. *Oglesby v. RCA Corporation*, 752 F.2d 272 (7th Cir. 1985); *Local 921, of Chicago & Cent. States Joint Bd., etc. v. Estate of Schmidt*, 684 F.Supp. 601 (W.D. Wis. 1988); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981); and *In re Wiring Device Antitrust Litigation*, 498 F.Supp. 79 (E.D.N.Y. 1980). However, only *Wiring Device* is on all fours with this case.[3]

The Seventh Circuit's decision in *Oglesby* is inapposite because the plaintiff attempted to assert a breach of contract claim in order to overcome certain filing limitations of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185. Because plaintiff's complaint referred to "statutory rights and privileges" located in federal law, and because his employment was governed by a collective bargaining agreement, the Seventh Circuit upheld the district court's conclusion that the state claims were "artfully plead" federal claims under the LMRA. In *Local 921, of Chicago & Cent. States Joint Bd., etc.*, the Honorable John C. Shabaz reached a similar conclusion because the state claims were "inextricably dependent" upon certain obligations "which . . . are governed by a collective bargaining agreement which is subject to § 301." *Id.* at 605.[4]

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[2] Both cases make clear that only direct purchasers (not indirect purchasers like Carlson) suffer an injury within the meaning of Section 4 of the Clayton Act, 15 U.S.C. § 15.

[3] Another case, not cited by the defendants, *Mechanical Rubber & Supply Co. v. American Saw and Manufacturing Co.*, 747 F.Supp. 1292 (C.D.Ill. 1990) is equally on point. Nevertheless, for the reasons set forth infra, the Court declines to follow either *Wiring Device* or *Mechanical Rubber*.

[4] In addition, these cases concerned labor disputes over which federal law reigns supreme. *Avco Corporation v. Aero Lodge No. 735, etc.*, 390 U.S. 557 (1968). The Supreme Court recently made clear that no such total preemption exists with respect to the antitrust laws. *California v. ARC*

Both of these cases are "artful pleading" cases where the plaintiffs, like Carlson, attempt to avoid federal jurisdiction from the outset. By contrast, *Moitie*, 452 U.S. 394 (1981), upon which the defendants also rely, is a *res judicata* case. There the plaintiffs had already lost in federal court and subsequently filed an "artfully plead" state court complaint. *Moitie* is not relevant because *res judicata* is not a defense in this case. Carlson has conceded that his "claim under the federal antitrust laws is [ ] clearly foreclosed by Supreme Court precedent . . . ." (Memorandum at 1). Accordingly, if this Court were to retain jurisdiction, dismissal would be on the merits, not because of the doctrine of *res judicata*.

As mentioned above, the only cases squarely on point are *Wiring Device* and *Mechanical Rubber*.[5] In those cases, the respective courts denied the motions to remand after considering the merits of the state antitrust claims. "[S]ince South Carolina has itself limited the application of its state antitrust statutes to intrastate commerce, the true nature of plaintiff's complaint is federal." *Wiring Device* at 83. "[T]his Court believes that Illinois courts would not extend the application of its antitrust law so that it would burden interstate commerce." *Mechanical Rubber* at 1296.[6] This Court declines to follow these cases for the following reasons. First, such a ruling gives short shrift to the oft-stated principle that the plaintiff is "master of the claim." If it is such a matter of settled law that Carlson's state claims are without merit, not only will

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America Corp. 490 U.S. 93 (1989).

[5] In *Free v. Abbott Laboratories, et al.*, 93-971-A (April 5, 1994), the identical issue was decided by The Honorable John V. Parker, Chief Judge for the Middle District of Louisiana, in accord with this Court's decision. (See attachment to Carlson's Memorandum).

[6] The Honorable John F. Grady of the Northern District of Illinois recently rejected as unwise the "broad rule" of *Mechanical Rubber*. *Corporate Travel Consultants, Inc. v. United Airlines, Inc.*, 799 F.Supp. 58, 60 (N.D.Ill. 1992).

dismissal be a swift and relatively simple matter, but Carlson risks being sanctioned under Wis. Stat. 802.05.[7] However, if dismissal is not so certain, this Court's retention of jurisdiction would improperly preclude Carlson from having the claim of his choice heard in the court of his choice. Second, assuming for the moment that the weight of Wisconsin authority is indeed contrary to Carlson's claim, retention of jurisdiction improperly precludes him from presenting to the state court compelling reasons for the reversal of that authority. Therefore, the merits of Carlson's claims should be heard by a Wisconsin court. Further, comity and a recognition of the federal judiciary's limited role, preclude the exercise of jurisdiction over these claims solely because they might be dismissed by a state court.

Lastly, even if Carlson's claims may be summarily dismissed in state court, they are not automatically transformed into federal claims for purposes of 28 U.S.C. §§ 1331 and 1441. As previously indicated, Carlson has no claim under the federal antitrust laws. Accordingly, Carlson's motion to remand Case No. 94-C-378 to the Circuit Court for Milwaukee County is granted.

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[7] This section, the equivalent to Fed. R. Civ. P. 11, provides for an award of sanctions if a pleading is "not well-grounded in fact or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law."

NOW THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

Plaintiff Richard R. Carlson's motion to remand is **GRANTED** and Case No. 94-C-378 is hereby **REMANDED** to the Circuit Court of Milwaukee County.

Dated at Milwaukee, Wisconsin, this 21st day of July, 1994.

SO ORDERED,

/s/ Rudolph T. Randa
HON. RUDOLPH T. RANDA
U.S. District Judge

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

LISA HEILMAN AND MARYLOU LEINTZ, ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED WITHIN THE STATE OF NORTH DAKOTA

Plaintiffs,

v.

ABBOTT LABORATORIES, INC., BRISTOL-MYERS SQUIBB CO., AND MEAD JOHNSON & CO.,

Defendants.

A1-94-122

MEMORANDUM AND ORDER

Defendants removed this case from State Court on the basis of diversity and on the claim that the complaint sets out an antitrust cause having validity only under Federal statutes.

Plaintiffs counter by pointing out that the complaint specifically seeks only state law remedy, if any there be, and that the amount in controversy does not exceed $50,000.00 and the diversity jurisdiction predicate is not met.

The memorandum opinion of United States District Judge Leon Jordan in the identical Tennessee case analyzing the merits of the matter is a well reasoned presentation. At first blush this case appears to be a prime example leading to the feeling of many legislators for the need for tort reform. It

appears to have been initially sued out in Federal Court as a class action, compromised and settled, (with, the court suspects, the law firms benefitting greatly and the class members in minuscule amounts). Once settled in Federal Court, plaintiffs proceeded to file in State Courts, seeking class certification. Defendants seek to remove into Federal Court, where one assumes a motion to dismiss will be made on a *res adjudicata* theory.

Plaintiffs seek remand to State Court, pointing with glee to the carefully crafted pleading which would appear to make removal not appropriate. I agree with Judge Jordan. If the plaintiffs say that they raise no Federal issue nor the dollar threshold for diversity, then remand is proper. If there is no state law upon which the plaintiffs can premise a cause of action, as defendants allege, then the very competent state court jurists can determine and will grant an appropriate motion for dismissal.

Plaintiff's motion for remand is granted. (11)

SO ORDERED

Dated this 17th day of April, 1995

/s/ Patrick A. Conmy
Patrick A. Conmy, District Judge
United States District Court

IN THE
UNITED STATES DISTRICT COURT
DISTRICT MASSACHUSETTS

APRIL BOOS

Plaintiff.

v.

ABBOTT LABORATORIES, INC, ET AL.,

Defendants.

August 18, 1995
Civil Action No. 95-10091-NG

ORDER

COHEN, M.J.

Plaintiff's Motion to Remand (# 03) was referred to this court for disposition. See Docket Entry # 10.[1] After hearing, Plaintiff's Motion to Remand (# 03) is denied for the reasons set forth more fully below.

A. RELEVANT FACTS

Plaintiff April Boos (hereinafter "Boos") originally brought this action in Suffolk Superior Court in both her individual and representative capacities on behalf of the

[1] This court has the power to rule and enter a final order on a motion to remand, inasmuch as allowing or denying a motion to remand is a non-case-dispositive matter within the meaning of Section 636((b)(1)(A) of Title 28. *See In Re Foster*, 52 F.2d 343 (Fed. Cir. 1995) (Table Disposition—Text Available on LEXIS and WESTLAW).

plaintiff class. She alleges that defendants Abbott Laboratories, Inc., Bristol-Meyers Squibb Co., Mead Johnson & Co. and American Home Products Corp. (hereinafter referred to collectively as "defendants") engaged in unfair or deceptive methods of competition in violation of Massachusetts General Laws, Chapter 93A, Section 2, and engaged in restraint of trade in violation of Massachusetts *common law*.

On January 13, 1995, defendants filed a Notice of Removal to this Court pursuant to 28 U.S.C. Sections 1441 and 1446, asserting jurisdiction under Sections 1331 (federal question)[2] and 1332 (diversity). On February 10, Boos filed her Plaintiff's Motion to Remand (# 03) the case to state court under 28 U.S.C. 1447(c). Boos contends that neither federal question jurisdiction nor diversity jurisdiction had been established by defendants.

B. DIVERSITY JURISDICTION

In filing her motion to remand, plaintiff essentially contends that—no one single claim for relief urged by plaintiff, as representative of the class which she seeks to represent, and/or by individual members of the class—exceeds $50,000.[3] On account of this, she says that, for want of the appropriate amount in controversy, federal diversity jurisdiction is inappropriate under the rationale and holding set forth in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).[4]

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[2] Insofar as defendants sought removal on the basis of a federal question, defendants essentially alleged that plaintiff's common law restraint of trade count was, in realty, a claim invoking federal antitrust law.

[3] Insofar as defendants sought removal on the basis of diversity, defendants essentially alleged that, among other things, judgment in favor of the plaintiff would have a financial impact upon defendants in excess of $50,000 *and* that plaintiff's demand for attorney's fees under Chapter 93 clearly brought the jurisdictional amount above $50,000.

[4] Defendants do not challenge this factual assertion insofar as plaintiff (named and class members) seek monetary relief by the nature of the claims

Defendants, on the other hand, say that—notwithstanding the fact that neither plaintiff (nor any particular member of the putative classes seeks *compensable damages* in excess of $50,000—the amount in controversy element is satisfied for two reasons: First, plaintiff seeks, among other things, an award of attorneys' fees which, no doubt, will exceed $50,000;[5] and second, since plaintiff seeks a declaration that defendants' practices constitute "deceptive" and "unfair" practices within the meaning of c. 93A, the practical pecuniary impact on each of the defendants clearly exceeds $50,000.

1. AMOUNT IN CONTROVERSY INCLUDING ATTORNEY'S FEES

In her Complaint, plaintiff demands, among other things, reasonable attorney's fees under the provisions of c. 93A. Defendants contend, and plaintiff concedes, that if plaintiff is successful in her c. 93A claim, reasonable attorneys' fees will clearly exceed $50,000.

The generally accepted rule is that attorneys' fees may be included in an assessment of the amount in controversy for purposes of determining diversity jurisdiction when they are either permitted under a statute or provided for by contract. *Missouri State Life Insurance Co. v. Jones*, 290 U.S. 199, 202, 54 S.Ct. 133, 78 L.Ed. 267 (1933); *Velez v. Crown Life Ins. Co.*, 599 F.2d 471 (1st Cir. 1979); *Department of Recreation v. World Boxing Ass'n*, 942 F. 2d 84, 89-90 (lst Cir. 1991); 1 Moore's Federal Practice ¶ 0.99[2] (2d ed. 1985).

Plaintiff contends, however, relying specifically upon a 1982 holding in *Goldberg v. CPC Intern, Inc.*, 678 F.2d 1365, 1367 (9th Cir.), *cert. denied*, 459 U.S. 945 (1982), that since

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set forth in the complaint. No individual plaintiff or member of the plaintiff class would receive monetary relief—that is, compensable damages—even approaching $50,000.

[5] Plaintiff does not gainsay the position of the defendants that attorney's fees, if recoverable, will exceed $50,000.

plaintiff's complaint contains class allegations, consideration of attorneys' fees in determining the amount in controversy offends the holding and rationale of *Zahn, supra*.[6]

In this court's view, however, the *Goldberg* court, and others which have echoed similar conclusions, are wrong on two counts.

(a) *First*, in suggesting that looking to attorneys' fees in determining the amount in controversy was contrary to the rationale of *Zahn*, that Court seemed to believe that that exercise required an "aggregation" of class claims.[7] But it does

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[6] There that Court observed—

> CPC tries to avoid Zahn's implications by arguing, correctly, that attorney's fees can be taken into account in determining the amount in controversy if a statute authorizes fees to a successful litigant. *Missouri State Life Insurance Co. v. Jones*, 290 U.S. 199, 202, 54 S. Ct. 133, 78 L. Ed. 267 (1933); *Stokes v. Reeves*, 245 F.2d 700, 702 (9th Cir. 1957). Cal. Bus. & Prof.Code § 16750(a) authorizes attorneys' fees.
>
> CPC next contends that the potential attorneys' fees should be attributed to the named plaintiffs only, rather than pro rata to each class member, or, in the alternative, that the potential fees should be attributed to the class as a whole and treated as a common fund. Thus the amount in controversy requirement would be met because either the named plaintiffs will each meet the jurisdictional amount, or the entire class will.
>
> We find that acceptance of either of CPC's theories would conflict with the policy of *Zahn v. International Paper Co.*, in which the Supreme Court reaffirmed that the "matter in controversy" requirement must be satisfied by each member of the plaintiff class. Plaintiffs whose claims fall short cannot satisfy the requirement by aggregation of claims. CPC's theories would seriously undermine and are contrary to the rule expressed by the Supreme Court in *Zahn*. Thus we conclude that the potential attorneys' fees do not satisfy the jurisdictional amount for this cause of action, and that there is, therefore, no federal jurisdiction.

[7] "Plaintiffs whose claims fall short cannot satisfy the requirement by aggregation of claims." *Id.* at 1367.

not appear that was the case there, and it certainly is not the case here.

In a more recent decision discussing the role of attorney's fees in determining the amount in controversy within the context of a complaint containing class allegations, the Fifth Circuit has observed (*Free v. Abbott Laboratories*, 51 F.2d 524 (5th Cir. 1995))—

> The court found it had diversity jurisdiction over the *named* plaintiffs' claims even though each named and unnamed plaintiff claimed only $20,000, less than the $50,000 minimum for diversity jurisdiction. 28 U.S.C. § 1332(a). The district court found that Louisiana law attributed all of a class's attorney's fees to the named plaintiffs. It held that the claim of the named plaintiffs for $20,000—once swelled by attorney's fees—met the $50,000 amount-in-controversy requirement.
>
> Plaintiffs argue that Louisiana statutes distribute the fees pro rata to all members of the class, with the result that none meets the amount-in-controversy requirement.

The distribution of attorney's fees centers on two Louisiana statutes. The first, Article 595 of the Louisiana Code of Civil Procedure, provides:

> The court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class . . .
>
> * * *
>
> Official Revision Comments
>
> (a) It is intended, in the first paragraph, that the reasonable expenses of litigation allowed the successful representative parties is to be paid out of the fund or benefits made available by their efforts.

The second key Louisiana statute is Section 51:137 of the Louisiana Revised Statutes, which provides:

> Any person who is injured in his business or property by any person by reason of any act or thing forbidden by this Part may sue in any court of competent jurisdiction and shall recover threefold the damages sustained by him, the cost of suit, and a reasonable attorney's fee.

Article 595, plaintiffs contend, supports their argument that the fees are to be distributed among all class members. See, *e.g.*, *White v. Board of Trustees*, 276 So. 2d 714, 719 (La. Ct. App.) (deducting pro rata shares of an Article 595 attorney's fee from the awards due to each plaintiff), writ ref'd, 279 So. 2d 694 (La. 1973).

We disagree. Defendants pay attorney's fees and damages. The plain text of the first sentence of 595 awards the fees to the "representative parties". (The language allowing the "representative parties" their fees is echoed in Comment (a).)

Finally, plaintiffs argue that construing Article 595 to attribute the fees to the named plaintiffs—rather than to distribute them among all the plaintiffs—renders the statute unconstitutional. The argument continues that the federal courts have generally held that Zahn forbids attributing the fees of class members to class representatives. The only circuit court to speak to this question held that attributing a class's attorney's fees only to the named plaintiffs instead of pro rata to each member of the class "would conflict with the policy of Zahn." *Goldberg v. CPC Int'l. Inc.*, 678 F.2d 1365, 1367 (9th Cir.), *cert. denied*, 459 U.S. 945, 74 L. Ed. 2d 202, 103 S. Ct. 259 (1982). Many district courts have followed Goldberg. But Goldberg's reading of Zahn sheds little light on the distinct policy choices behind Louisiana's decision regarding rights of recovery by class members. That a state

> chooses a set of rules that result in an award in excess of $50,000 frustrates no policy of Zahn. Simply put, under the law of Louisiana the class representatives were entitled to fees. Their rights of recovery were not created by a judge's summing the discrete rights of class members. The district court applied the law of Louisiana. Because it did so, we are persuaded that the individual claims of the class representatives met the requisite jurisdictional amount. (Emphasis added.)

This case is clearly controlled by *Free*, and permitting the claim to proceed in this court against the *named* plaintiff does no violence whatsoever to *Zahn*.

In this case, plaintiff demands attorney's fees under the provisions of c. 93A, § 9(4). That statute, not at all unlike the Louisiana statute referred to in *Free*, awards attorney's fees (upon the successful prosecution of a c. 93A claim) to the *named* party plaintiff. That statute provides, in pertinent part:

> (4) If the court finds in any civil action *commenced* hereunder that there has been a violation of section two, the *petitioner* shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorney's fees . . . . (Emphasis added.)

In this case, it is clear that "aggregation" is not required to make out attorney's fees in excess of $50,000. At the hearing before this court, counsel for plaintiff conceded that to fairly prosecute the claims set forth in the complaint, wholly apart from attorney's fees which could be fairly associated with class matters, attorney's fees would exceed $50,000. That is to say, even if this case was brought as a single plaintiff case *sans* class allegations, the attorney's fees would be essentially the same,[8] and certainly in excess of $50,000. To say, as plaintiff

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[8] Excepting minor additional attorney's fees relating solely to the establishment of class matters.

seemingly says, that the rule of *Zahn* requires that—in circumstances such as those presented here—attorney's fees be totally disregarded if a named plaintiff's claim is piggybacked with class allegations, is to turn *Zahn* into a jurisdictional sword rather than the jurisdictional shield intended. It cannot be gainsaid that, had plaintiff brought her claims against the defendants solely on her own behalf, removal jurisdiction on behest of the defendants was and is clearly warranted. *Zahn* cannot be fairly read to mean that a plaintiff may defeat that established right to removal simply by expediently penning class claims in a complaint.

(b) *Secondly*, in suggesting that looking to attorney's fees to make out the requisite amount in controversy ". . . would seriously undermine and are contrary to the rule expressed by the Supreme Court in *Zahn*[,]" and thus concluding that subject matter jurisdiction was wanting, the *Goldberg* court misconstrued the actual *holding*—not to mention the supporting rationale—in *Zahn*.

In *Zahn*, a number of *named* plaintiffs, on behalf of themselves and a class which they sought to represent, filed a common law nuisance case against the defendant in the district court. The claims of each of the *named* plaintiffs exceeded the jurisdictional amount required by 28 U.S.C. § 1332.[9] None of the claims of the *class* members could have exceeded that jurisdictional amount. Plaintiffs in that case invoked subject matter jurisdiction on the grounds of diversity. Inasmuch as the claims of the named plaintiffs exceeded the jurisdictional amount, the district judge concluded that subject matter existed as to those claims brought against the defendant. But inasmuch as the claims of the *class* members did not exceed the jurisdictional amount, the district judge declined to certify the class—concluding that the *class* members could not aggregate their respective individual claims to satisfy the jurisdictional

[9] At that time, the jurisdictional amount required was $10,000. Since then, of course, it has been increased to $50.000.

amount. On a petition for certiorari, the Supreme Court affirmed the decision of the district court—rejecting the assertion of petitioners in that case that the district court could assume "ancillary" jurisdiction over the claims of the *class* members.

The actual holding therefore was *not*, as suggested by the *Goldberg* court, that subject matter jurisdiction was lacking for the entire case, but *only* as to the claims of the putative class members whose claims did not (individually) exceed the jurisdictional amount. It bears repeating that, notwithstanding the conclusion by the district judge in *Zahn* that none of the putative *class* members' claims would exceed the jurisdictional amount, the district judge nevertheless *retained* jurisdiction over the claims of the *named* plaintiffs against the defendants, and *dismissed* the class claims, and the class claims only, for want of subject matter jurisdiction.

(c) In these circumstances, it is clear here—as it was in *Free*, *supra*[10]—that the *named* plaintiff's entitlement to attorney's fees in excess of $50,000 satisfies the amount in controversy element of diversity jurisdiction,[11] and that so holding does not do violence to either the letter or spirit of the

[10] On another matter not dealing exclusively with the attorney fee calculation as used in the amount in controversy calculi, the *Free* court discussed the effect of the Judicial Improvements Act of 1990, 28 U.S.C. Section 1367. Defendants seemingly urge that that Act overrules the holding in *Zahn*, and, not surprisingly, plaintiff urges that it did not— relying on the authority, among others, of *Mayo v. Key Financial Services, Inc.*, 812 F. Supp. 277 (D.Mass. 1993).

Because of this court's disposition of the matter as set forth in the text herein, there is no occasion to enter that thorny thicket except to say that, given this court's disposition herein, the tables may well be turned in later proceedings; that is, it might well be *plaintiff* who would contend that that Act overruled the holding in *Zahn*, and defendants who contend that it does not. See note 16, p. 9, below.

[11] Plaintiff does not suggest that the other required elements of diversity jurisdiction are lacking.

holding in *Zahn*; indeed, so holding in this case is clearly consistent with the actual holding in *Zahn*.

2. AMOUNT IN CONTROVERSY INCLUDING FINANCIAL IMPACT ON DEFENDANTS

Under settled law, in a case in which the complainant, in addition to seeking compensatory damages, also seeks a declaration of rights, it is appropriate to assess the amount in controversy by looking to the consequences of that declaration to a defendant. *E.g.*, *Beacon Construction Co. v. Matco Electric Co.*, 521 F.2d 392, 399 (2d Cir. 1975) (considering both damages and value of declaratory judgment, because "the amount in controversy is not necessarily the money judgment sought or recovered, but rather *the value of the consequences which may result from the litigation*") (emphasis added), *citing Smith v. Adams*, 130 U.S. 167, 175 (1889). *Work v. U.S. Trade, Inc.*, 747 F. Supp. 1184 (E.D.Va. 1990) (considering declaratory judgment claim together with $45,000 damages claim to satisfy $50,000 amount in controversy requirement);[12]

[12] Albeit in *dicta*, our Court of Appeals has, at least on three occasions, indicated that it was prepared to measure the amount in controversy—in cases in which injunctive or declaratory relief was sought—by the value of the consequences which may result from the litigation. *See e.g.*, *Williams v. Kleppe*, 539 F.2d 803, 804-05 n.1 (1st Cir. 1976) (". . . more realistically, we can rely on the extent of the claimed pecuniary bunden on defendants were plaintiffs to prevail."); *Commonwealth of Massachusetts v. United States Veterans Ass'n*, 541 F.2d 119, 122 n. 3 (1st Cir. 1976) ("Since the pecuniary burden on the VA would probably be in excess of $10,000 should the Commonwealth prevail, we think that the jurisdictional amount requirement is satisfied"); *Berman v. Narragansett Racing Ass'n*, 414 F.2d 311 (1st Cir. 1969), *cert. denied*, 396 U.S. 1037 (1970).

Plaintiff suggests that other holdings in this district are to the contrary, citing, primarily, *Hairston v. Home Loan and Investment Bank*, 814 F.Supp. 180, 182 (D.Mass. 1993). In that case, however, the district judge (Tauro, C.J.) did *not* reject the notion that the amount in controversy could and should be measured in terms of the consequences which might result from the litigation. To the contrary, accepting that position, the district judge simply concluded that, in the circumstances of that particular case, he could not fairly conclude that the economic value of those "consequences" would exceed $50,000.

14A Wright, Miller & Cooper, Federal Practice & Procedure §3725, pp. 431-32 (1985).[13] In assessing the consequences of a declaration of rights, it is appropriate to look at, among other things, the ". . . . possibility of detrimental effect on sales and loss of goodwill" by party seeking diversity jurisdiction. *See McCain Foods Ltd. v. Puerto Rico Supplies, Inc.*, 766 F. Supp. 58, 60 (D.P.R. 1991).

In this case, it would blink reality to assume that the declaratory relief which plaintiff seeks would have a financial impact on each of the named defendants of less than $50,000. Among other things, plaintiff alleges that the defendants, and each of them, engaged in "unfair and deceptive practices" for more than twelve years, "grossly overcharg[ing]" consumers in Massachusetts "millions of dollars." At bottom, plaintiff alleges that the defendants, and each of them, engaged in price gouging and price fixing—the latter a criminal offense. *See* 15 U. S. C. § 1.[14]

It is thus clear that, inasmuch as plaintiff seeks, among other things, a declaration that the defendants have engaged in "unfair and deceptive practices" for the last twelve years, more or less, in violation of the provisions of Chapter 93A, the real stakes, the real amount in controversy, for the defendants, indeed, each of the defendants, clearly exceeds $50,000.

C. DISPOSITION

For the reasons stated above, this court finds and concludes that the *named* plaintiff's claims against each of the defendants

[13] The authors deem a "defendant's viewpoint" approach when declaratory or injunctive relief is sought the "most desirable method of computation . . .". *Id.* at 432.

[14] A felony, punishable by a fine (for corporations) not exceeding $10 million.

satisfies the amount in controversy provisions of 28 U.S.C. § 1332, and that, therefore, the case was properly removed to this court.[15] Accordingly, insofar as plaintiff seeks to remand the named plaintiff's claims to the state court, that motion is denied.[16]

/s/ Laurence P. Cohen
UNITED STATES MAGISTRATE JUDGE

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[15] Inasmuch as this court finds that diversity jurisdiction exists, there is no occasion to address the other grounds asserted by defendants for removal jurisdiction, save to say that, insofar as plaintiff, in Count 2, alleges *common law* restraint of trade, it appears that the "artful pleading" doctrine referred to in defendants' oppositions to the motion to remand might well apply if plaintiff, in making out a case of so-called common law restraint of trade, asks the court to interpret the common law consistent with the holdings in cases interpreting the federal antitrust acts.

[16] This disposition, of course, leaves plaintiff's class allegations in a state of limbo. But that is not an anomaly— it was precisely the same case as *Zahn*, the main authority upon which plaintiff relies.

As indicated above, Section 1.(b), p. 8, the district court, in *Zahn*, did *not* dismiss the case for want of subject matter jurisdiction. Instead, it *retained* jurisdiction over the claims of the *named* plaintiffs *vis a vis* the defendants, and *dismissed* the class claims. And that holding was left undisturbed by the United States Court of Appeals for the Second Circuit and the Supreme Court of the United States.

At the present time, of course, the only matter before this court is plaintiff's motion to remand. The validity—the viability—of the class claims is not a matter before this court, and it is one which must be left for another day—a day, perhaps, when, as indicated elsewhere, n. 10, p. 9, above, the parties may engage in a role reversal *vis a vis* their respective positions as to the meaning of the Judicial Improvements Act of 1990, 28 U.S.C. Section 1367.

106TH CONGRESS
1ST SESSION **H.R. 1875**

AN ACT

To amend title 28, United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE AND REFERENCE.

(a) SHORT TITLE - This Act may be cited as the 'Interstate Class Action Jurisdiction Act of 1999'.

(b) REFERENCE - Whenever in this Act reference is made to an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 28, United States Code.

SECTION 2. FINDINGS.

The Congress finds that—

(1) as recently noted by the United States Court of Appeals for the Third Circuit, interstate class actions are 'the paradigm for Federal diversity jurisdiction because, in a constitutional sense, they implicate interstate commerce, invite discrimination by a local State, and tend to attract bias against business enterprises';

(2) most such cases, however, fall outside the scope of current Federal diversity jurisdiction statutes;

(3) that exclusion is an unintended technicality, inasmuch as those statutes were enacted by Congress before the rise of the modern class action and therefore without recognition that interstate class actions typically are substantial controversies of the type for which diversity jurisdiction was designed;

(4) Congress is constitutionally empowered to amend the current Federal diversity jurisdiction statutes to permit most interstate class actions to be brought in or removed to Federal district courts; and

(5) in order to ensure that interstate class actions are adjudicated in a fair, consistent, and efficient manner and to correct the unintended, technical exclusion of such cases from the scope of Federal diversity jurisdiction, it is appropriate for Congress to amend the Federal diversity jurisdiction and related statutes to allow more interstate class actions to be brought in or removed to Federal court.

SECTION 3. JURISDICTION OF DISTRICT COURTS.

(a) EXPANSION OF FEDERAL JURISDICTION- Section 1332 ((28 USCA 1332)) is amended by redesignating subsections (b), (c), and (d) as subsections (c), (d), and (e), respectively, and by inserting after subsection (a) the following:

"(b) (1) The district courts shall have original jurisdiction of any civil action which is brought as a class action and in which—

"(A) any member of a proposed plaintiff class is a citizen of a State different from any defendant;

"(B) any member of a proposed plaintiff class is a foreign state and any defendant is a citizen of a State; or

"(C) any member of a proposed plaintiff class is a citizen of a State and any defendant is a citizen or subject of a foreign state.

As used in this paragraph, the term 'foreign state' has the meaning given that term in section 1603(a) ((28 USCA 1603)).

"(2) (A) The district courts shall not exercise jurisdiction over a civil action described in paragraph (1) if the action is—

"(i) an intrastate case;

"(ii) a limited scope case; or

"(iii) a State action case.

"(B) For purposes of subparagraph (A)—

"(i) the term 'intrastate case' means a class action in which the record indicates that—

"(I) the claims asserted therein will be governed primarily by the laws of the State in which the action was originally filed; and

"(II) the substantial majority of the members of all proposed plaintiff classes, and the primary defendants, are citizens of the State in which the action was originally filed;

"(ii) the term limited scope case, means a class action in which the record indicates that all matters in controversy, asserted by all members of all proposed plaintiff classes do not in the aggregate exceed the sum or value of $1,000,000, exclusive of interest and costs, or a class action in which the number of members of all proposed plaintiff classes in the aggregate is less than 100; and

"(iii) the term 'State action case' means a class action in which the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.

"(3) Paragraph (1) shall not apply to any claim concerning a covered security as that term is defined in section 16(f)(3) of the Securities Act of 1933 ((15 USCA 77p)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 ((15 USCA 78bb)).

"(4) Paragraph (1) shall not apply to any class action solely involving a claim that relates to—

"(A) the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

"(B) the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 ((15 USCA 77b)) and the regulations issued thereunder).".

(b) CONFORMING AMENDMENT- Section 1332(c) ((28 USCA 1332)) (as redesignated by this section) is amended by inserting after 'Federal courts' the following: 'pursuant to subsection (a) of this section'.

(c) DETERMINATION OF DIVERSITY- Section 1332 ((28 USCA 1332)), as amended by this section, is further amended by adding at the end the following:

"(f) For purposes of subsection (b), a member of a proposed class shall be deemed to be a citizen of a State different from a defendant corporation only if that member is

a citizen of a State different from all States of which the defendant corporation is deemed a citizen.".

SECTION 4. REMOVAL OF CLASS ACTIONS.

(a) IN GENERAL - Chapter 89 [FN1] is amended by adding after section 1452 ((28 USCA 1452)) the following:

"Sec. 1453. Removal of class actions

"(a) IN GENERAL - A class action may be removed to a district court of the United States in accordance with this chapter, but without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed—

"(1) by any defendant without the consent of all defendants; or

"(2) by any plaintiff class member who is not a named or representative class member of the action for which removal is sought, without the consent of all members of such class.

"(b) WHEN REMOVABLE - This section shall apply to any class action before or after the entry of any order certifying a class, except that a plaintiff class member who is not a named or representative class member of the action may not seek removal of the action before an order certifying a class of which the plaintiff is a class member has been entered.

"(c) PROCEDURE FOR REMOVAL - The provisions of section 1446(a) ((28 USCA 1446)) relating to a defendant removing a case shall apply to a plaintiff removing a case under this section. With respect to the application of subsection (b) of such section, the requirement relating to the 30-day filing period shall be met if a plaintiff class member who is not a named or

representative class member of the action for which removal is sought files notice of removal no later than 30 days after receipt by such class member, through service or otherwise, of the initial written notice of the class action provided at the court's direction.

"(d) EXCEPTIONS—

"(1) COVERED SECURITIES - This section shall not apply to any claim concerning a covered security as that term is defined in section 16(f)(3) of the Securities Act of 1933 ((15 USCA 77p)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 ((15 USCA 78bb)).

"(2) INTERNAL GOVERNANCE OF BUSINESS ENTITIES - This section shall not apply to any class action solely involving a claim that relates to—

"(A) the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

"(B) the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 ((15 USCA 77b)) and the regulations issued thereunder).".

(b) REMOVAL LIMITATIONS - Section 1446(b) ((28 USCA 1446)) is amended in the second sentence—

(1) by inserting ', by exercising due diligence' after 'ascertained'; and

(2) by inserting '(A)' after 'section 1332'.

(c) TECHNICAL AND CONFORMING AMENDMENTS - The table of sections for chapter 89 is amended by adding after the item relating to section 1452 the following:

"1453. Removal of class actions.".

(d) APPLICATION OF SUBSTANTIVE STATE LAW - Nothing in this section or the amendments made by this section shall alter the substantive law applicable to an action to which the amendments made by section 3 of this Act apply.

(e) PROCEDURE AFTER REMOVAL - Section 1447 ((28 USCA 1447)) is amended by adding at the end the following new subsection:

"(f) If, after removal, the court determines that no aspect of an action that is subject to its jurisdiction solely under the provisions of section 1332(b) ((28 USCA 1332)) may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, it shall dismiss the action. An action dismissed pursuant to this subsection may be amended and filed again in a State court, but any such refiled action may be removed again if it is an action of which the district courts of the United States have original jurisdiction. In any action that is dismissed pursuant to this subsection and that is refiled by any of the named plaintiffs therein in the same State court venue in which the dismissed action was originally filed, the limitations periods on all reasserted claims shall be deemed tolled for the period during which the dismissed class action was pending. The limitations periods on any claims that were asserted in a class action dismissed pursuant to this subsection that are subsequently asserted in an individual action shall be deemed tolled for the period during which the dismissed class action was pending.".

SECTION 5. APPLICABILITY.

The amendments made by this Act shall apply to any action commenced on or after the date of the enactment of this Act.

SECTION 6. GAO STUDY.

The Comptroller General of the United States shall, by not later than 1 year after the date of the enactment of this Act, conduct a study of the impact of the amendments made by this Act on the workload of the Federal courts and report to the Congress on the results of the study.

Passed the House of Representatives September 23, 1999.

Attest:

Clerk

106TH CONGRESS
1ST SESSION

S. 353

To provide for class action reform, and for other purposes.

IN THE SENATE OF THE UNITED STATES

February 3, 1999

Mr. GRASSLEY (for himself, Mr. KOHL, and Mr. THURMOND) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide for class action reform, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Class Action Fairness Act of 1999".

SEC. 2. NOTIFICATION REQUIREMENT OF CLASS ACTION CERTIFICATION OR SETTLEMENT.

(a) IN GENERAL - Part V of title 28, United States Code, is amended by inserting after chapter 113 the following new chapter:

"CHAPTER 114—CLASS ACTIONS

"Sec.

"1711. Definitions.

"1712. Application.

"1713. Notification of class action certifications and settlements.

"1714. Limitation on attorney's fees in class actions.

"Sec. 1711. Definitions

"In this chapter the term—

"(1) 'class' means a group of persons that comprise parties to a civil action brought by 1 or more representative persons;

"(2) 'class action' means a civil action filed pursuant to rule 23 of the Federal Rules of Civil Procedure or similar State rules of procedure authorizing an action to be brought by 1 or more representative persons on behalf of a class;

"(3) 'class certification order' means an order issued by a court approving the treatment of a civil action as a class action;

"(4) 'class member' means a person that falls within the definition of the class;

"(5) 'class counsel' means the attorneys representing the class in a class action;

"(6) 'Plaintiff class action' means a class action in which class members are plaintiffs; and

"(7) 'proposed settlement' means a settlement agreement between or among the parties in a class action that is subject to court approval before the settlement becomes binding on the parties.

"Sec. 1712. Application

"This chapter shall apply to—

"(1) all plaintiff class actions filed in Federal court; and

"(2) all plaintiff class actions filed in State court in which—

"(A) any class member resides outside the State in which the action is filed; and

"(B) the transaction or occurrence that gave rise to the class action occurred in more than 1 State.

"Sec. 1713. Notification of class action certifications and settlements

"(a) Not later than 10 days after a proposed settlement in a class action is filed in court, class counsel shall serve the State attorney general of each State in which a class member resides and the Attorney General of the United States as if such attorneys general and the Department of Justice were parties in the class action with—

"(1) a copy of the complaint and any materials filed with the complaint and any amended complaints (except such materials shall not be required to be served if such materials are made electronically available through the Internet and such service includes notice of how to electronically access such material);

"(2) notice of any scheduled judicial hearing in the class action;

"(3) any proposed or final notification to class members of—

"(A)(i) the members' rights to request exclusion from the class action; or

"(ii) if no right to request exclusion exists, a statement that no such right exists; and

"(B) a proposed settlement of a class action;

"(4) any proposed or final class action settlement;

"(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;

"(6) any final judgment or notice of dismissal;

"(7)(A) if feasible the names of class members who reside in each State attorney general's respective State and

the estimated proportionate claim of such members to the entire settlement; or

"(B) if the provision of information under subparagraph (A) is not feasible, a reasonable estimate of the number of class members residing in each attorney general's State and the estimated proportionate claim of such members to the entire settlement; and

"(8) any written judicial opinion relating to the materials described under paragraphs (3) through (6).

"(b) A hearing to consider final approval of a proposed settlement may not be held earlier than 120 days after the date on which the State attorneys general and the Attorney General of the United States are served notice under subsection (a).

"(c) Any court with jurisdiction over a plaintiff class action shall require that—

"(1) any written notice provided to the class through the mail or publication in printed media contain a short summary written in plain, easily understood language, describing—

"(A) the subject matter of the class action;

"(B) the legal consequences of being a member of the class action;

"(C) the ability of a class member to seek removal of the class action to Federal court if—

"(i) the action is filed in a State court; and

"(ii) Federal jurisdiction would apply to such action under section 1332(d);

"(D) if the notice is informing class members of a proposed settlement agreement—

"(i) the benefits that will accrue to the class due to the settlement;

"(ii) the rights that class members will lose or waive through the settlement;

"(iii) obligations that will be imposed on the defen"dants by the settlement;

"(iv) the dollar amount of any attorney's fee class counsel will be seeking, or if not possible, a good faith estimate of the dollar amount of any attorney's fee class counsel will be seeking; and

"(v) an explanation of how any attorney's fee will be calculated and funded; and

"(E) any other material matter; and

"(2) any notice provided through television or radio to inform the class members of the right of each member to be excluded from a class action or a proposed settlement, if such right exists, shall, in plain, easily understood language—

"(A) describe the persons who may potentially become class members in the class action; and

"(B) explain that the failure of a person falling within the definition of the class to exercise such person's right to be excluded from a class action will result in the person's inclusion in the class action.

"(d) Compliance with this section shall not provide immunity to any party from any legal action under Federal or State law, including actions for malpractice or fraud.

"(e)(1) A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member resides in a State where the State attorney general has not been provided notice and materials under subsection (a).

"(2) The rights created by this subsection shall apply only to class members or any person acting on a class member's

behalf, and shall not be construed to limit any other rights affecting a class member's participation in the settlement.

"(f) Nothing in this section shall be construed to impose any obligations, duties, or responsibilities upon State attorneys general or the Attorney General of the United States.

"Sec. 1714. Limitation on attorney's fees in class actions

"(a) In any class action, the total attorney's fees and expenses awarded by the court to counsel for the plaintiff class may not exceed a reasonable percentage of the amount of—

"(1) any damages and prejudgment interest actually paid to the class;

"(2) any future financial benefits to the class based on the cessation of alleged improper conduct by the defendants; and

"(3) costs actually incurred by all defendants in complying with the terms of an injunctive order or settlement agreement.

"(b) Notwithstanding subsection (a), to the extent that the law permits, the court may award attorney's fees and expenses to counsel for the plaintiff class based on a reasonable lodestar calculation.".

(b) TECHNICAL AND CONFORMING AMENDMENT - The table of chapters for part V of title 28, United States Code, is amended by inserting after the item relating to chapter 113 the following:

"114. Class Actions ..... 1711".

SEC. 3. DIVERSITY JURISDICTION FOR CLASS ACTIONS.

Section 1332 of title 28, United States Code, is amended—

(1) by redesignating subsection (d) as subsection (e); and

(2) by inserting after subsection (c) the following:

"(d)(1) In this subsection, the terms 'class', 'class action', and 'class certification order' have the meanings given such terms under section 1711.

"(2) The district courts shall have original jurisdiction of any civil action where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is a class action in which—

"(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

"(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

"(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

"(3) The district court shall abstain from hearing a civil action described under paragraph (2) if—

"(A)(i) the substantial majority of the members of the proposed plaintiff class are citizens of a single State of which the primary defendants are also citizens; and

"(ii) the claims asserted will be governed primarily by the laws of that State; or

"(B) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.

"(4) In any class action, the claims of the individual members of any class shall be aggregated to determine whether the matter in controversy

exceeds the sum or value of $75,000, exclusive of interest and costs.

"(5) This subsection shall apply to any class action before or after the entry of a class certification order by the court.

"(6)(A) A district court shall dismiss, or, if after removal, strike the class allegations and remand, any civil action if—

"(i) the action is subject to the jurisdiction of the court solely under this subsection; and

"(ii) the court determines the action may not proceed as a class action based on a failure to satisfy the conditions of rule 23 of the Federal Rules of Civil Procedure.

"(B) Nothing in subparagraph (A) shall prohibit plaintiffs from filing an amended class action in Federal or State court.

"(C) Upon dismissal or remand, the period of limitations for any claim that was asserted in an action on behalf of any named or unnamed member of any proposed class shall be deemed tolled to the full extent provided under Federal law.

"(7) Paragraph (2) shall not apply to any class action, regardless of which forum any such action may be filed in, involving any claim relating to—

"(A) the internal affairs or governance of a corporation or other form of entity or business association arising under or by virtue of the statutory, common, or other laws of the State in which such corporation, entity, or business association is incorporated (in the case of a corporation) or organized (in the case of any other entity); or

"(B) the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) ((15 USCA 77b)) of the Securities Act of 1933 or the rules and regulations adopted under such Act).".

SEC. 4. REMOVAL OF CLASS ACTIONS TO FEDERAL COURT.

(a) IN GENERAL- Chapter 89 of title 28, United States Code, is amended by adding after section 1452 ((28 USCA 1452)) [FNI] the following: "Sec. 1453. Removal of class actions

"(a) In this section, the terms 'class', 'class action', and 'class member' have the meanings given such terms under section 1711.

"(b) A class action may be removed to a district court of the United States in accordance with this chapter, except that such action may be removed—

"(1) by any defendant without the consent of all defendants; or

"(2) by any plaintiff class member who is not a named or representative class member without the consent of all members of such class.

"(c) This section shall apply to any class action before or after the entry of any order certifying a class.

"(d) The provisions of section 1446 ((28 USCA 1446)) relating to a defendant removing a case shall apply to a plaintiff removing a case under this section, except that in the application of subsection (b) of such section the requirement relating to the 30-day filing period shall be met if a plaintiff class member files notice of removal within 30 days after receipt by such class member, through

service or otherwise, of the initial written notice of the class action.

"(e) This section shall not apply to any class action, regardless of which forum any such action may be filed in, involving any claim relating to—

"(1) the internal affairs or governance of a corporation or other form of entity or business association arising under or by virtue of the statutory, common, or other laws of the State in which such corporation, entity, or business association is incorporated (in the case of a corporation) or organized (in the case of any other entity); or

"(2) the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) ((15 USCA 77b)) of the Securities Act of 1933 or the rules and regulations adopted under such Act).".

(b) REMOVAL LIMITATION - Section 1446(b) of title 28, United States Code, is amended in the second sentence by inserting "(a)" after "section 1332".

(c) TECHNICAL AND CONFORMING AMENDMENTS - The table of sections for chapter 89 of title 28, United States Code, is amended by adding after the item relating to section 1452 ((28 USCA 1452)) the following:

"1453. Removal of class actions.".

SEC. 5. REPRESENTATIONS AND SANCTIONS UNDER RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Rule 11(c) of the Federal Rules of Civil Procedure is amended—

(1) in the first sentence by striking "may, subject to the conditions stated below," and inserting "shall";

(2) in paragraph (2) by striking the first and second sentences and inserting "A sanction imposed for violation of this rule may consist of reasonable attorneys' fees and other expenses incurred as a result of the violation, directives of a nonmonetary nature, or an order to pay penalty into court or to a party."; and

(3) in paragraph (2)(A) by inserting before the period ", although such sanctions may be awarded against a party's attorneys".

SEC. 6. EFFECTIVE DATE.

The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act.